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A Model Act Regulating Board And Care Homes: Guidelines For States

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Jane Beyer
Josephine Bulkley
Paula Hopkins

A REPORT PREPARED FOR THE
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

BY
THE AMERICAN BAR ASSOCIATION'S
COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY
Staff Director: Nancy Coleman
And
COMMISSION ON THE MENTALLY DISABLED
Staff Director: John Parry

This model act has not been approved by the House of Delegates or the Board of Governors and therefore does not constitute the policy of the American Bar Association.

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FOREWORD

In October, 1982, the American Bar Association's Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled were awarded a grant by the United States Department of Health and Human Services, Office of Human Development Services to develop a model act for regulating board and care homes. The goal of the project was to develop a comprehensive and workable statutory scheme for licensing board and care homes to ensure that their elderly and disabled residents enjoy a safe and decent living environment. The final draft of the act reflects two years of examination by project staff of the operation of board and care homes, the needs of board and care home residents, and the administration of state board and care licensing programs, as well as legal research of state and federal statutes and case law affecting the regulation of residential care facilities.

The act is intended to serve as a model for state legislators undertaking revision of their board and care homes licensing programs. It does not take into account the economic or political idiosyncracies of a particular state. Rather, it is anticipated that a state using the model act will adapt the legislation to its own needs consistent with the purposes of the Act.

The ABA's Commission on the Mentally Disabled has been a pioneer in the protection of the rights of mentally and developmentally disabled citizens. Established in 1973 as a 15-member interdisciplinary group of lawyers, doctors, consumer advocates and mental health administrators, the Commission, currently chaired by Bruce Ennis, has maintained its interdisciplinary focus and its strong support within the ABA, giving it a unique ability to integrate the various professional perspectives affecting the provision of board and care services.

The Commission's first, most important, and longest running project is the *Mental and Physical Disability Law Reporter** and Legal Resource Center. This highly acclaimed journal with its data bank of cases, legislation, books and articles forms the foundation for the dissemination of essential legal information to those in the mental health and developmental disability fields. Its other projects have included:

- *Disabled Persons and the Law* (1982) (Sales, Powell, Van Duizend and Associates)—an 875-page book published by Plenum Press that sets out existing legislation in the 50 states and recommends model legislation in numerous substantive areas involving disabled persons;
- *Legal Resources for the Mentally Disabled: A Directory of Lawyers and Other Specialists* (1983);
- Participation in the development of draft ABA Criminal Justice Mental Health Standards scheduled for publication in 1985;
- Amicus brief in *Pennhurst v. Halderman* (1980);
- Co-sponsorship of the Insanity Defense Resolution passed by the ABA in 1983.

The Commission on Legal Problems of the Elderly was established by the Board of Governors of the American Bar Association in 1978 to analyze and respond to the law-related needs of older people in the United States. It is a 15-member interdisciplinary committee appointed by the President of the ABA. Chaired by Lyman M. Tondel, Jr., the Commission counts among its members practicing attorneys, legal scholars, aging network staff, gerontologists, elderly law specialists, former government officials, and senior citizen advocates.

The work of the Commission has included:

- *The Law and Aging Resource Guide,* a 350-page compendium of public and private sector legal advocacy programs for the elderly;
- A bi-monthly newsletter, *BIFOCAL,* which is disseminated to the aging network—including Area Office on Aging personnel, state and local administrators, and the elderly legal network;
- A National Bar Activation Program that has increased the quality and quantity of private bar involvement for the elderly, and that has developed over twenty publications including a manual on how to establish a reduced fee lawyer referral program for the elderly and a companion piece on how to ensure quality control once such programs are established;
- A 453-page book on aspects of enforcing the ADEA, entitled: *ADEA: Age Discrimination in Employment Act, A Symposium Handbook for Lawyers and Personnel Practitioners,* January 1983. The book followed a highly successful conference on the same subject co-sponsored with the National Council on the Aging and the Equal Employment Advisory Council;
- A monograph on *Model Recommendations: Intermediate Sanctions for Enforcement of Quality of Care in Nursing Homes,* July 1981—an initial look by the Commission at enforcement tools used by the states.

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*Until 1984 the publication was known as the *Mental Disability Law Reporter.*

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PREFACE

In recent years, the problem of substandard conditions in board and care homes has become the focus of national attention because of little or no state regulation of these homes. As two commentators have pointed out, the statutory schemes for regulation which did exist were usually inadequate.

> Piecemeal legislation, in which responsibility for regulating different aspects of the home and its environment is divided among various state and local agencies, is likely to be counterproductive; it necessitates duplicative work by enforcement agencies and multiple inspections which are disruptive for the residents and a disincentive for the provider. Such an approach increases the likelihood of corruption, because of lack of centralized control and responsibility, and of overregulation because no one is in a position to assess the cumulative effect of codes, which separately appear reasonable.[1]

Congress was alerted to the substandard conditions in board and care homes because of fires resulting in the deaths of hundreds of residents. In an effort to establish a federal enforcement mechanism to upgrade conditions in these homes, Congress enacted the Keys Amendment to the Social Security Act in 1977.[2] Although the Keys Amendment requires states to certify that homes which serve a significant number of Supplemental Security Income (SSI) recipients meet minimum standards, the only sanction for failure to comply with these standards is the reduction of the SSI benefits of the residents in the substandard home. The understandable reluctance to reduce the SSI benefits of residents has diminished the effectiveness of the Keys Amendment and current federal regulation. As a result, improving conditions in board and care homes presently is left to the states.

This model act for regulating board and care homes offers assistance to states undertaking the task of improving conditions in these homes. The act attempts to address the problems of piecemeal and inadequate legislation by unifying all aspects of regulation of board and care homes under a single statutory scheme which delegates primary responsiblity for carrying out the act to one state agency. The model act is not directed solely at state legislators, but to all persons and organizations who are concerned with legislative reform of the regulation of board and care homes.

METHODOLOGY

The model act was developed in five stages: (1) survey of board and care programs; (2) research and analysis of state statutes; (3) identification and research of legal issues and policies; (4) first draft; and (5) final draft.

(1) Survey of Board and Care Programs. A telephone survey of board and care programs in the fifty states and the District of Columbia was conducted under a grant from the Atlantic Richfield Corporation. This survey, conducted jointly by the American Bar Association's Commission on Legal Problems of the Elderly and the Aging Health Policy Center at the University of California at San Francisco, identified more than 130 state programs throughout the country which regulate board and care homes.

(2) Research and Analysis of State Statutes. After the grant for development of the model act was awarded in October of 1982, the project staff researched, compiled and reviewed the state statutes which govern the programs identified by the survey. Each state statute was analyzed to determine how that state dealt with issues important to regulating board and care homes such as definition, resident rights, licensing, monitoring and enforcement, and zoning. This research and analysis of existing state laws regulating board and care homes culminated in the *Board and Care Report: An Analysis of State Laws and Programs Serving Elderly Persons and Disabled Adults,* a report to the Department of Health and Human Services under grant number 90DJ001/01 in February 1983. An excerpt from this report was published under the same title in the *Mental Disability Law Reporter.*[3]

(3) Identification of Issues and Development of Policies. The development of a model act necessarily involved decisions regarding issues and policies which affect the final product. In developing a model act regulating board and care homes, the Commissioners were confronted with numerous difficult and controversial issues, such as: whether the definition of a board and care home should be drafted in broad language to cover all Keys facilities or in more narrow language to cover only a type of Keys facility; whether to define a board and care home to include a facility that serves residents who need personal assistance but are not receiving it; whether a limitation should be placed on the number of residents a home is permitted to serve; whether homes should be required to provide transportation for residents; and whether search warrants should be required prior to inspections of board and care homes. In deciding these and many more difficult questions, the Commissioners relied on the expertise of their project staff and the members of both Commissions, and consulted extensively with experts outside of the Commissions. A joint subcommittee of the two Commissions was established to review the drafts of the model act, and consultants were used because of their expertise on certain issues. In addition, meetings were held with the Department of Health and Human Services, advocacy groups, providers, and national representatives of state agencies specifically to discuss the issues of definition, size, board and care plans and monitoring enforcement. The ideas presented at these meetings helped to formulate the issues and policies underlying the model act.

(4) First Draft. After completing the research and analysis of the issues relating to the regulation of a board and care home, initial drafting of the model act began. Each of the principal authors was assigned primary responsibility for researching and drafting several sections of the act. The drafts of the completed sections were then critically reviewed and edited by the principal authors and the staff directors. Typically, each section was revised at least two to three times prior to completion of the first draft.

A first draft of the model act and accompanying comment was completed and mailed to more than two hundred and fifty persons for review. The reviewers of the first draft included the Department of Health and Human Services, representatives of each of the state agencies which regulate board and care home programs, national, state and local provider and advocacy groups, and other persons who expressed an interest in reviewing the model act. Written comments were received from more than thirty persons and these comments were read, catalogued, and discussed prior to inclusion in the model act.[4]

(5) Final Draft. Extensive revisions were made to the model act as a result of comments to the first draft and specific instructions from the two Commissions. In addition, consultants were used to review the monitoring and enforcement sections of the act. As with the first draft, one author was assigned primary responsibility for revisions to a section, but all project staff were involved in reviewing and editing the final draft. As a result of the comments received, a few sections were added to the final draft which did not appear in the first draft: Section 7, State Licensing to Supersede Local Regulation; Section 19, Variance; Section 35, Right of Resident to Intervene in Agency Adjudication Proceedings; and Section 36, Right of Resident to Seek Judicial Review of Final Agency Action and to Intervene in Judicial Review Proceedings.

HOW TO USE THE MODEL ACT

The model act is the culmination of research of statutory and case law regulating board and care homes, and ideas and information received from experts in the field on how board and care homes should be regulated. Based upon this research, these ideas and information, this model act represents the Commission's view of the best approach for regulating board and care homes. As with any model, it does not take into account the individual problems of each state. As noted previously, it is anticipated that states will modify the provisions in the act to meet their own needs consistent with the purposes of the act.

Brackets are used to indicate language that the two Commissions concluded was either controversial or subject to variation based on the particular needs of a jurisdiction. Nonetheless, the language enclosed in the brackets represents the Commissions' view of what is most appropriate based on a national perspective, acknowledging that there may be other legitimate views on the subject. Any changes that states make, however, should be consistent with the purposes of the applicable section and the purposes of the Act as a whole. For example, one of the most controversial issues in the model act is whether a limit should be placed on the number of residents a board and care home is permitted to serve. For the reasons stated in the comment to Section 4.1., the act limits the number of persons in a home to thirty (30). That number is bracketed because a state may have a good reason for modifying the limitation based on its own experience and needs in providing decent and humane board and care services.

Other sections of the act may need modification to ensure consistency with other state laws. The model act incorporates by reference other state laws, such as state rules of civil procedure in Sections 32.1 and 32.2, and the state administrative procedures act in Section 6. Generally, the comments to those sections which assume the existence of other laws discuss those laws and alert states to the need to modify these sections of the act to be consistent with existing state law.

To ensure uniformity from state to state, language such as "advocate" in sections 31.1., 32.1., 33.1., and 34., and "court of competent jurisdiction" in sections 33.1., 32.2., and 34., have been used in the model act. As is generally pointed out in the comment, states should replace the word "advocate" with the name of the organization designated to represent residents of board and care homes and should replace "court of competent jurisdiction" with the name of the court which will have jurisdiction to hear the cases referred to in that section.

Finally, states might consider adopting sections of the model act in statutes regulating other residential care facilities. Some states currently have licensing statutes which apply to a broad range of facilities.[5] In particular, the monitoring and enforcement, licensing, and resident rights provisions should apply to other residential facility settings. Indeed, provisions from various state licensing statutes were considered and adopted for use in the model act.

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1. W. Markstrom & J. Clymer, *Barriers to the Development of Community-Based Residential Facilities for the Elderly and Handicapped,* The Urban Lawyer 464, 473 (1979).

2. 42 U.S.C. § 1616(e) (1982).

3. *State Laws and Programs Serving Elderly Persons and Disabled Adults,* 7 Mental Disability Law Reporter 158 (March-April, 1983).

4. *See* Appendix for a list of individuals and groups who commented on the model act.

5. State statutes regulate a wide variety of residential care facilities. For example, some statutes regulate nursing homes and intermediate care facilities as well as board and care homes. *See, e.g.,* Ala. Code §§ 22-21-20 *et seq.* (Supp. 1982); Conn. Gen. Stat. Ann. §§ 19-576 *et. seq.* (Supp. 1982); Neb. Rev. Stat. §§ 71-2017 *et. seq.* (Supp. 1982); N.M. Stat.

Ann. §§ 24-1-1 *et. seq.* (1981). Others regulate facilities serving residents limited to a certain group such as elderly or mentally disabled persons. *See, e.g.,* Wash. Rev. Code Ann. §§ 18.20.010 *et. seq.* (Supp. 1982) (licenses boarding homes for aged persons); Mo. Rev. Stat. Ann. § 630.005 *et. seq.* (Vernon Supp. 1982) (licenses facilities for mentally disabled persons and persons affected by alcohol or drug abuse). One state statute regulates residential treatment facilities and board and care homes. Or. Rev. Stat. §§ 443.400 *et. seq.* (1981).

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SECTION 1. PURPOSE.

The purposes of this Act are to:

(A) encourage the establishment and maintenance of privately and publicly operated board and care homes that provide a humane, safe, and homelike environment for elderly, disabled, or other persons who need some personal assistance, but who do not need institutional residential care;

(B) establish standards for regulating board and care homes in order to adequately protect residents without unnecessarily discouraging the establishment and continued operation of such homes;

(C) encourage the development of small board and care homes by establishing standards that are consistent with the needs and resources of a small home and by permitting those homes to meet certain requirements of the Act by obtaining variances from the agency;

(D) provide for appropriate placement of individuals in board and care homes by requiring that each resident has a board and care plan, or, if the resident prefers, a physician's certification;

(E) encourage the development of board and care plans for residents in order to assist homes in providing personal assistance appropriate for each resident and to encourage the use of supportive services in the surrounding community to meet the needs of residents;

(F) accord each resident the right to participate in the development of the board and care plan and in other major decisions involving the resident's care;

(G) ensure that board and care home administrators and staff have the training and other resources they need in order to understand and comply with the Act or regulations promulgated pursuant to the Act;

(H) monitor a board and care home's compliance with the Act through routine inspections and provide to homes in violation of the Act consultation and an opportunity to correct violations before administrative enforcement sanctions are imposed;

(I) provide the agency and residents with alternative mechanisms to enforce compliance with the Act's provisions;

(J) promote the location of licensed board and care homes in appropriate residential neighborhoods and avoid overconcentration of homes in any one residential district; and

(K) provide information to consumers, providers, and the public and encourage their full participation in developing and enforcing standards under the Act in order to ensure support for board and care homes and residents.

COMMENT

A statement of the purposes of the model act is intended to articulate the overall goals and policies of the act. This section strives to provide a comprehensive, clearly stated, and specific enumeration of such purposes. It also recognizes that certain competing interests or objectives of the act can be balanced to achieve a cohesive and harmonious set of policies that underlie the act's provisions.

The purpose clause serves two additional objectives. One is to provide legislative intent to assist and guide courts when necessary in interpreting the act's provisions. Second, a detailed, complete, and clear description of the act's purposes ensures that specific standards are enunciated by the legislature to guide the agency in carrying out its rulemaking authority. Courts have upheld delegations of legislative authority in which the purpose clause contains clear and specific language to guide the agency in carrying out a statute's requirements by promulgating regulations.[1]

1. *See Boswell, Inc. v. Harkins,* 230 Kan. 738, 741 (1982); *Levine v. Whalen,* 384 N.Y.S.2d 721, 723-24 (1976). *See also infra* section 5 & comment.

SECTION 2. DEFINITION OF BOARD AND CARE HOME, RELATED SERVICES, AND EXEMPTIONS.

Section 2.1. Board and Care Home.

"Board and care home" means a publicly or privately operated residence that provides personal assistance, lodging, and meals to two (2) or more adults who are unrelated to the licensee or administrator.

COMMENT

The definition of a board and care home contains several elements that, in combination, differentiate board and care homes from other types of residential facilities. Several words and phrases used in the definition, "provides," "personal assistance," "adults," "unrelated," "licensee," and "administrator," are defined separately.[1] The minimum size requirement of "two (2) or more" residents is discussed in section 4.2, "Categories of Homes Based Upon Size and Minimum Size."[2]

The model act regards board and care homes as one residential service on a continuum of community care[3] for elderly persons and mentally ill and developmentally disabled adults. Board and care homes fall on this continuum of community residential services between facilities designed for independent living, such as boarding homes on the one end, and intermediate care facilities and residential treatment facilities on the other.[4] Residen-

tial treatment facilities are exempted specifically from the definition of a board and care home.[5]

The model act is intended to regulate all facilities that fall within the definition of a board and care home regardless of whether the facilities are publicly or privately operated. The problems addressed by the model act, such as the provision of inadequate care in substandard environments and abuse and neglect of residents and their rights, can occur in publicly run facilities as well as privately operated ones. The phrase "publicly or privately operated" is included in the definition expressly to avoid any ambiguity that might result in an interpretation that would exclude state-operated homes from coverage.[6]

The word residence was chosen in order to include all residential settings that provide personal assistance, lodging, and meals to their residents even if those services are provided in a residence in which each resident lives in a separate unit. A facility that does not have the capability to provide personal assistance, meals, or lodging is not a board and care home. One example of a facility that would not fall within the definition of a board and care home is a supervised apartment setting in which each resident has his or her own kitchen and there is no common kitchen or dining area for communal meals. In other words, it is the capacity to provide the services, and not the physical structure in which those services are provided, that determines whether a living arrangement is a board and care home.

Exclusions

Residential facilities that are not covered by the act's definition of a board and care home are not considered exemptions but are noted briefly here to ensure that they are not construed as being within the act's definition.[7] For example, boarding homes that do not provide any personal assistance are not within the act's definition. While a few states regulate boarding homes by statute, in most jurisdictions, such homes must comply only with county or municipal fire, health, and building codes.[8] In addition, the definition excludes board and care homes in which only one resident is served. The reasons for this exclusion are discussed in the comment to section 4.2, "Categories of Homes Based Upon Size and Minimum Size."

1. *See infra* sections 2.2—2.7, 3.
2. *See infra* section 4.2.
3. In one case, the phrase "continuum of care" is defined as "a system developed to ensure that the full range of inpatient and outpatient services is available to each patient and includes monitoring progress during all phases of treatment, habilitation and rehabilitation." *Caswell v. Secretary, Dep't. of Health and Human Services,* Civ. Action No. 77-04-88-CV-W-8, at 7 (W.D. Mo. Feb. 8, 1983).
4. For the purpose of this commentary, facilities that provide supportive services as a direct service of the facility are called residential treatment facilities. These facilities are equivalent to Medicaid-certified intermediate care facilities for elderly and mentally retarded persons. An intermediate care facility is defined as a facility that provides "on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who, because of their mental or physical condition, require care and services (above the level of room and board) which can be made available to them only through institutional facilities." 42 U.S.C. § 1396d(c) (1976 & Supp. III 1979). Medicaid does not certify intermediate care facilities for the mentally ill. However, there are residential treatment centers serving mentally ill persons that provide levels of services equivalent to intermediate care facilities for the mentally retarded and the elderly. The services that are provided in each of the facilities differ.

   Also excluded from the definition of a board and care home are boarding homes. The distinction between a board and care home and a boarding home was made by the Office of the Inspector General, U.S. Dept. of Health and Human Services in its report entitled *Board and Care Homes* (1982):

   > Boarding homes are residences that simply provide their residents a place to sleep and food while board and care facilities not only offer room and board, but also some form of protective oversight. *Id.* at iv.

5. *Infra,* section 2.8.
6. In *Wisconsin Veteran's Home v. Division of Nursing Home Forfeiture Appeals,* 104 Wis. 2d 106, 310 N.W.2d 646 (1981), the court held that the civil penalty provision of Wisconsin's nursing homes statute did not apply to state owned and operated homes, in part because the statute did not expressly provide for that coverage.
7. State licensing statutes vary widely in the range and nature of facilities that they cover. Some govern only adult board and care facilities. *See, e.g.,* Fla. §§ 400.401 *et seq.* (West Supp. 1982); Idaho Code §§ 39-3301 *et seq.* (1977 & Supp. 1982); Ill. Ann. Stat. ch. 111½, §§ 4151-113 *et seq.* (Smith-Hurd Supp. 1982-1983). Some board and care statutes include adult foster homes. *See, e.g.,* Mich. Comp. Laws Ann. §§ 400.701 *et seq.* (Supp. 1982). Some also include children's facilities under their statute. N.Y. Soc. Serv. Law §§ 460 *et seq.* (McKinney Supp. 1981-1982). Some states have a licensing statute that deals both with board and care and residential treatment facilities. Or. Rev. Stat. §§ 443.400 *et seq.,* 479.210 *et seq.,* 431.325 *et seq.* (1981). A number of states license a full range of both health care as well as board and care facilities under one statute. *See, e.g.,* Ala. Code §§ 22-21-20 *et seq.* (1977 & Supp. 1982); Conn. Gen. Stat. Ann. §§ 19-576 *et seq.* (West 1977 & Supp. 1982); Neb. Rev. Stat. §§ 71-2017 *et seq.* (1981 & Supp. 1982); N.H. Rev. Stat. Ann. §§ 151-A *et seq.* (1981 & Supp. 1982); N.M. Stat. Ann. §§ 24-1-1 *et seq.* (1981). A few statutes license only facilities for elderly persons, while others are limited to facilities for mentally disabled persons. For example, Washington's Boarding Home Act only licenses boarding homes for aged persons. Wash. Rev. Code Ann. §§ 18.20.010 *et seq.* (1978 & Supp. 1982). Missouri's Department of Mental Health Act only regulates residential facilities for "persons affected by mental disorders, mental illness, mental retardation, developmental disabilities, or alcohol or drug abuse." Mo. Rev. Stat. §§ 198.003 *et seq.* (Supp. 1982).
8. *See, e.g.,* N.J. Stat. Ann. §§ 55:13B-1 *et seq.* (Supp. 1982).

Section 2.2 Provides.

"Provides" means that the home makes personal assistance available to the residents. A home that holds itself out by advertising or word of mouth to provide personal assistance is deemed to make personal assistance available to its residents for the purposes of this Act.

COMMENT

The meaning of "provides" as it is commonly used is "to make available; supply; afford."[1] The model act expands this meaning to the extent that it defines "provide" also to include a home that holds itself out to others as making personal assistance available. This addi-

tional denotation incorporates into the definition of a board and care home facilities which advertise or tell consumers that they offer personal assistance to their residents without regard to whether, in fact, such services are provided.

1. *Webster's New World Dictionary* at 1144 (2d College ed. 1980).

Section 2.3. Personal Assistance.

"Personal assistance" means the provision by the staff of the home of one or more of the following services, as required by the board and care plan or the physician's certificate or as reasonably requested by the resident, including:

(A) helping the resident with activities of daily living;

(B) assisting the resident with the daily living activities such as making appointments and arranging transportation that are necessary in order for the resident to receive the supportive services required in the board and care plan;

(C) being aware of the resident's general whereabouts, although the resident may travel independently in the community; and

(D) monitoring the activities of the resident while on the premises of the residence to ensure his or her health, safety, and well-being.

COMMENT

Personal assistance is defined under the model act to encompass the concepts of personal care, supervision, and protective oversight.[1] The term "personal assistance" was chosen because the connotation of that phrase is more consistent with the goal of the act to encourage the autonomy of the residents. The emphasis is intended to be on helping a resident to carry out the activities of daily living rather than on treating a resident or doing activities for a resident which the resident could do for himself or herself. Performing activities for a resident is appropriate under the model act only if the resident is totally unable to perform the activity alone or with assistance.[2]

Personal assistance may be necessary to assist a resident in performing activities of daily living or to help the resident obtain supportive services in the community. Examples of the former are helping the resident to dress, bathe, and eat. Examples of the latter are helping the resident to make an appointment for health care services and to use public transportation to obtain services at a local senior center. Personal assistance also includes the concept of supervision by providing for monitoring and guiding the activities of residents who require these services to ensure their well-being.

Personal assistance is provided in accordance with the board and care plan, the physician's certification, or reasonable requests by the resident. Permitting these services to be provided upon request by the resident covers not only the situation in which a resident may not have a board and care plan, but also those situations that may arise which were not anticipated at the time of preparation of the plan. In addition, since a resident must agree to the personal assistance provided to him or her, the individual's autonomy is protected.

1. The definition of personal assistance is adapted from two state statutes and one state regulation: W.Va. Code § 16-5C-2 (1979); Mich. Comp. Laws Ann. §§ 400.706(1), .707(5) (West Supp. 1982); Wis. Admin. Code § 3.05(25) [H.H.S.] (1980).

2. A study conducted by the Denver Research Institute indicated that some residents of board and care homes were receiving help in areas in which the assistance was not needed. N. Dittmar, G. Smith, J. Bell, C. Jones, & D. Manzanares, *Board and Care for Elderly and Mentally Disabled Populations* 180-211 (Denver Research Institute, 1983).

Section 2.4. Daily Living Activities.

"Daily living activities" means:

(A) walking;

(B) bathing, shaving, brushing teeth, combing hair;

(C) dressing;

(D) eating;

(E) getting in or getting out of bed;

(F) laundry;

(G) cleaning room;

(H) managing money;

(I) shopping;

(J) using public transportation;

(K) writing letters;

(L) making telephone calls;

(M) obtaining appointments;

(N) self-administration of medication;

(O) recreational and leisure activities; and

(P) other similar activities.

COMMENT

The model act defines daily living activities by listing examples of functions with which a resident might need personal assistance. The categories of activities are based, in part, on categories used by the Denver Research Institute in a federally funded study of board and care homes.[1]

The general category of daily living activities is broken into specific categories to emphasize the range of activities that an individual performs regularly. In determining the extent to which a resident needs personal assistance, attention should be focused on the individual categories and not on the broad concept of daily living activities. Detailing the functions that comprise daily living activities is one step toward the goal of the model act to encourage the provision of assistance only with the specific activities for which the resident needs and re-

quests help. For example, a board and care plan or physician's certification should state that a resident needs help with walking and getting in or out of bed but is able to and prefers to take care of her own personal hygiene. Another resident's board and care plan may state that he only needs help in using public transportation and in being reminded of appointments and to take his medication. Once again, the emphasis is on encouraging the autonomy of the resident by providing assistance only with those daily living activities that the resident cannot perform independently and permitting the resident to perform all activities of which he or she is capable.

1. N. Dittmar, G. Smith, J. Bell, C. Jones, & D. Manzanares, *Board and Care for Elderly and Mentally Disabled Populations* (Denver Research Institute, 1983).

Section 2.5. Supportive Services.

"Supportive services" means specific services that are provided to the resident in the community and that are required by the board and care plan or reasonably requested by a resident. Supportive services include:

(A) mental health services;

(B) habilitation services;

(C) rehabilitation services;

(D) social services;

(E) medical, dental, and other health care services;

(F) educational services;

(G) financial management services;

(H) legal services;

(I) vocational services;

(J) transportation;

(K) recreational and leisure activities; and

(L) other services required to meet a resident's needs.

COMMENT

Supportive services are those services that a resident needs to enhance his or her ability to live independently in the community. The supportive services that a resident needs should be provided by individuals in the community rather than by the staff of a home. Under the model act, a facility that is a direct provider of supportive services such as mental health services is exempted from the definition of a board and care home.[1]

An exception to this rule is leisure and recreational services which are defined as both supportive services and daily living activities. Although residents should be encouraged to enjoy recreational and leisure activities outside the home, there may be residents who are either unwilling or unable to go out into the community regularly. Moreover, in homes serving a large number of residents, the provision of recreation and leisure activities generally is necessary to encourage social interaction within the facility.

Although the definition lists general areas in which services may be required, it is intended that the board and care plan list the specific services required by each resident. For example, if a resident has a mental health problem, he or she may require mental health services; the board and care plan should state, where possible, the specific services, such as group therapy and monitoring of psychotropic medication by a psychiatrist, required by a resident.

The effectiveness of the model act depends upon the existence of supportive services in the community. Although limited federal and state funds may adversely affect the availability and quality of supportive services in some communities, it is the intent of the act that residents use services that exist in the community, such as community mental health centers, area agencies on aging, senior centers, and services for developmentally disabled persons.

Board and care home residents often do not receive needed professional services. A recent study found that residents also do not participate in social activities outside the home.[2] In some geographical areas, there may be a lack or shortage of community supportive services or recreational activities. However, if such services or activities are available, the model act requires operators to assist residents in obtaining them.[3]

1. *See infra* section 2.8.

2. N. Dittmar, G. Smith, J. Bell, C. Jones & D. Manzanares, *Board and Care for Elderly and Mentally Disabled Populations* (Denver Research Institute, 1983).

3. New and comprehensive state board and care programs follow this approach. Operator and case manager responsibilities to assist clients in obtaining services are clearly spelled out in case plans, licensing regulations, and program guidelines; and efforts are made to acquaint operators with a range of health, social, and other resources in the community. *See* C. Harmon, *Board and Care: An Old Problem, A New Resource for Long Term Care* 31 (Center for the Study of Social Policy, Washington, D.C. June 30, 1982).

Section 2.6. Unrelated.

"Unrelated means [to be defined by state law].

COMMENT

The act's definition of a board and care home excludes homes which care for relatives, as long as two or more non-relatives do not also reside in the home. In other words, homes in which relatives reside along with two or more than two non-relatives would also be covered by the act.

Excluding relatives from the definition of a board and care home is based on the premise that homes in which persons care for family members should not be subject to government regulation. Government regulation of family situations might be open to constitutional attack as a violation of the right to family integrity or privacy emanating from a number of constitutional guarantees.[1] Moreover, this exemption is intended to encourage individuals to care for relatives in their own homes in order

to avoid unnecessary placement in residential facilities or institutions. Adult abuse or neglect reporting laws and protective services legislation are the appropriate legal mechanisms for dealing with resident exploitation, financial or otherwise, when it occurs within a family situation.[2]

About one-third of the state licensing statutes surveyed have an explicit provision exempting board and care homes owned or operated by relatives of the residents.[3] The model act does not define the term "unrelated," leaving to individual states the decision about which relatives fall within the exclusion. The terms "blood, marriage, or adoption" also are not specifically included in the definition because it is assumed that in-law and adoptive relationships are treated by law in most states in the same manner as blood relationships. Some licensing statutes exclude first cousins, some include first cousins, and at least one statute includes second cousins.[4]

The model act's use of the term "unrelated" is intended to encourage a broad meaning of relatives exempted from the act's coverage. Determining who are considered close or distant relatives is a difficult and somewhat arbitrary decision. It may be that uncles, aunts, nephews, or nieces are no more intimate than first cousins; on the other hand, first or second cousins might be closer than siblings in a particular family. In order to ensure the constitutionality of drawing a distinction among relatives, states may be wise to adopt a broad definition to evince recognition of the concept of the extended family described as including cousins in the U. S. Supreme Court's decision in *Moore v. East Cleveland.*[5]

1. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390 (1923), which adopted a broad reading of liberty in the Fourteenth Amendment and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), which held that parents have a liberty interest "to direct the upbringing and education of children under their control." Not until 1965 did the Supreme Court again find a substantive due process privacy right, created by several fundamental constitutional guarantees, in *Griswold v. Connecticut,* 381 U.S. 479 (1965) and subsequent cases, including the right to an abortion in *Roe v. Wade,* 410 U.S. 113 (1973). The right of individuals to be free from governmental intrusion has been applied in many personal contexts, including family relationships. *See also Prince v. Massachusetts,* 321 U.S. 158 (1944).

2. In a 1980 survey, protective services legislation for disabled or elderly persons was identified in 25 states by the Senate Special Committee on Aging. *See* E. Salend, M. Satz, J. Pynoos, *Mandatory Reporting Legislation for Adult Abuse,* in *Abuse of Older Persons, Report of the First National Conference on Abuse of Older Persons,* National Council of Senior Citizens (Boston, Mass., 1981). In 16 states, mandatory reporting laws were found to require certain persons to report suspected abuse or neglect of adults, including, for example, Alabama, Connecticut, Florida, Nebraska, New Hampshire, North Carolina, Oklahoma, and South Carolina. *Id.*

3. Most statutes simply state that homes are exempt where the residents are "related" to the owner or operator, without defining the relationship. *See, e.g.,* Alaska Stat. § 47.35.080 (1975); Conn. Gen. Stat. Ann. § 19-576 (West Supp. 1982); Fla. Stat. Ann. § 400.402 (West Supp. 1982); Ind. Code Ann. § 16-10-4-2 (West Supp. 1982); Md. Health Code Ann. §19-301(m) (Supp. 1983); Miss. Code Ann. § 43-11-1 (Supp. 1980); Neb. Rev. Stat. § 71-2017.01 (1981); Okla. Stat. tit. 63, § 1-1902 (1981); Tex. Rev. Civ. Stat. Ann. art. 4442(c), (Vernon Supp. 1982-1983); Vt. Stat. Ann. tit. 18, § 2002 (1968). A number of statutes use the terms unrelated "by blood or marriage." *See, e.g.,* Alaska § 47.35.080; Okla. § 1-1901; Or. Rev. Stat. § 443.400 (1981).

   Some statutes specifically define the relationships for which the exemption applies, such as brother, sister, parent, child, while a few use the language "within the third or fourth degree of consanguinity." *See* Del. Code Ann. tit. 16, § 1101 (1975); Mich. Comp. Laws Ann. § 400.707 (Supp. 1982); N.Y. Soc. Serv. Law § 461-b (McKinney 1983); Ohio Rev. Code Ann. § 3721.01 (Page Supp. 1982); Pa. Stat. Ann. tit. 62, § 1001 (Purdon Supp. 1982); Wash. Rev. Code Ann. § 18.20.020 (Supp. 1982); W. Va. Code § 16-5C-2(b) (1979).

   About half of the above statutes include first cousins, while the rest exclude first cousins and beyond. The statutes which include first cousins are in Michigan and Washington. Statutes excluding cousins are in Delaware, New York, Ohio, and Pennsylvania. West Virginia's statute includes second cousins.

4. *See supra* note 3.

5. 431 U.S. 494 (1977). In *Moore,* a case challenging a zoning ordinance which made it unlawful for persons not closely related to live together, a grandmother was found to be in violation of the ordinance for sharing her home with two grandsons. Utilizing a strict scrutiny, and not a deferential review analysis, the court found the law unconstitutional, holding that the Constitution's due process clause protects the sanctity of the family. The court interpreted family to include uncles, aunts, cousins, and grandparents, as well as parents and children. The court stated:

   > The appropriate limits on substantive due process come not from drawing arbitrary lines but rather from "careful respect for the teaching of history [and] solid recognition of the basic values that underlie our society...."Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. [Ours] is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.
   >
   > *Id.* at 503.

Section 2.7. Adults.

"Adults" means persons who have attained the age of eighteen (18) years.

COMMENT

The definition, by using the term "adults," excludes facilities that exclusively or primarily house children, although a board and care home in which one or a few children may reside is intended to be covered by the model act.

One expert in the developmental disability field argues that children should not be placed in residential facilities with adults because the functions and responsibilities of the administrator or staff of a residential facility are different for children than adults.[1] In a children's residential facility, there may be a strong and desirable dependency relationship between a child and the staff, unlike an adult residence in which the adult is likely to be more independent. Further, an adult resident is free to reject services or supervision, while a child usually is not.

Children also have basic needs that differ from adults and that require special attention. These give rise to issues that would not be addressed in a statute regulating adult

homes, including education, continuous supervision, strong involvement with parents and family, permanency planning, and others. Conversely, there may be issues applicable to adults that would not apply to children or would apply differently, such as the area of resident rights.[2]

Most important, the goals for residential placement of children are often different than those for adult residential placement. Out-of-home placements of children should be temporary; the goal of permanency is paramount, requiring the child's return home, placement for adoption, or some other permanent placement.[3] For some elderly or disabled adults, on the other hand, placement in a board and care home may represent a permanent living arrangement, often following release from an institution or nursing home.

Finally, state licensing legislation governing facilities for children who must be cared for outside their homes generally is found in a separate statutory framework and may be included in a comprehensive statutory scheme dealing with children in the legal system (e.g., child abuse and neglect, juvenile delinquency, status offenses, foster care, termination of parental rights, etc.).[4] Very few licensing statutes governing board and care homes currently include children in their definition of the population served in such homes; indeed, a number of statutes specifically exclude children from their definition.[5]

1. W. Wolfensberger, *The Principle of Normalization in Human Services* 84-85 (1972). Wolfensberger states that serving children and adults in the same facility:

> does not parallel most accepted patterns of analogous services to individuals not defined as deviant in society; and to treat children and adults in the same context provides the children with inappropriate adult models and, on the other hand, diminishes the dignity of the adult resident by casting him into a role not sufficiently demarcated from a childlike one.

Id.

2. *But see* Interstate Consortium, N.J. Dep't of Human Services, *Guidebook on Residential Care* (Trenton, N.J. 1980), which contains a statement and discussion of children's rights in children's residential facilities. Children's rights, however, would be quite different from adult residents' rights.

3. *See generally Foster Children in the Courts* (M. Hardin ed. 1983).

4. *See, e.g.*, Mo. Ann. Stat. § 210.010 *et seq.*, § 210.201 *et seq.* (Vernon 1983).

5. *See, e.g.*, Fla. Stat. Ann. § 400.402(9) (West Supp. 1982); Ill. Ann. Stat. ch. 111½, § 4151-113 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. § 16-10-4-2 (Burns 1983); Kan. § 39-923 (1981); Me. Rev. Stat. Ann. tit. 22, § 7901 (1980 & Supp. 1982); N.C. Gen. Stat. § 131D-2 (Supp. 1982); Or. Rev. Stat. § 443.400 (1981).

Section 2.8. Exemptions.

The following residential facilities shall be exempt from the application of this Act:

(A) a facility that houses individuals under the jurisdiction of the criminal justice system;

COMMENT

Facilities that house individuals under the jurisdiction of the criminal justice system are exempted from the model act. Individuals in these residences may be on conditional release from prison or may have been committed to the facility as an alternative to prison. Making these facilities a part of the board and care system would result in dual regulation. Facilities that serve persons within the criminal justice system generally are governed by the state's correctional system.[1] Moreover, such facilities would require different licensing or regulatory standards to address issues concerning greater security, closer supervision or partial confinement, or community opposition to their location.[2]

(B) a hospice that serves terminally ill persons;

COMMENT

"Hospice" describes a system of care for terminally ill persons and families who decide they do not want to continue a treatment regimen aimed at providing a cure. The goal of a hospice is to maintain the individual and family as comfortably and as painlessly as possible. While hospice services may be provided in special hospice settings, most hospice care is rendered in the individual's own home.[3] The special nature of this service and of the needs of dying persons justifies separate licensing legislation for hospices.

Moreover, hospices presently are regulated under existing state health care facility legislation (e.g., hospice, home health agency, nursing home, or hospital licensing statutes) and are regulated by federal Medicare provisions. Like other health care services reimbursed by Medicare, hospices will be required to meet minimum federal and state licensing standards in order to obtain Medicare certification.[4]

(C) a residential facility in which the licensee, administrator, or staff of the facility provides supportive services as provided in section 2.5(A), (B), (C), (D), and (E) to residents whose health, safety, or personal welfare-related needs make them unable to live in a residential setting in which the service is not provided; and

COMMENT

Residential treatment facilities are exempted from the definition of a board and care home primarily because the specialized issues in regulating such facilities are beyond the scope of this legislation.[5] Moreover, many of the issues relating to such facilities are different than the issues relating to board and care homes. Most residents of a residential treatment facility need a more structured and restrictive environment in which supportive services, such as medical, nursing, mental health, or rehabilitation services, usually are provided in-house by professional staff. Residents of board and care facilities, on the other hand, have more freedom of movement and need only

assistance and supervision provided by non-professional staff. Generally, persons who are able to reside in a board and care home may receive medical, mental health, or rehabilitation services outside the home, and may engage in various other activities outside the home.

Indeed, a major underlying policy of the act is to encourage residents to receive services in the community since such individuals do not require in-house services. Members of society normally do not receive medical, mental health, or other similar services in their homes, nor do they engage in social, work, or educational activities in their homes. Many residents of board and care homes, as former patients of mental health or mental retardation facilities, historically received mental health and medical services (as well as leisure activities) within their living environment. To continue to permit these services to be provided in an individual's home when they can be provided outside the home tends to create an institutional environment, and may result in reinstitutionalization. Integration of residents into the community can occur only if they are encouraged to go out into the community to receive the services they need.

(D) temporary shelters.

COMMENT

Temporary shelters also are exempted from the act and are distinguishable from board and care homes in several respects.[6] First, in contrast to board and care residents, persons served in temporary residential arrangements need fewer services, normally only food, housing, and access to community social service and health agencies. Second, board and care homes seek to provide a stable and sometimes permanent environment to their residents, while the goal of shelter services is a rapid transition to independence through the provision of services needed to surmount a particularly difficult crisis period. Further, like residential facilities for persons under the jurisdiction of the criminal justice system, inclusion of shelters in the model act would result in dual regulation. A number of states have recently enacted legislation funding shelters serving victims of domestic violence; such funding is conditioned upon the shelter meeting certification standards developed by the funding agency.[7]

1. *See, e.g.*, Minn. Stat. Ann. § 241.32 (West Supp. 1983); Wis. Stat. Ann. § 53.01 (West Supp. 1982-1983). One commentator notes that "correctional halfway houses are funded through contracts with the Federal Bureau of Prisons and Division of Probation, state departments of corrections, and probation and parole authorities." Comment, *Confidential Communications in the Correctional Halfway House Setting,* 27 Clev. St. L. Rev. 565, 569 (1972). This indicates that the administration of correctional halfway houses is largely the responsibility of state departments of corrections and probation and parole authorities.
2. *See* J. Goldmeier, *New Directions in Aftercare: Cooperative Apartment Living* (1975).
3. Committee on Aging, New York State Senate, *Hospice: Its Concept and Legislative Development* 9 (1982).
4. Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 122(d)(3) 96 Stat. 324 (1982).
5. Wis. Health & Human Serv. R. § 3.04(2)(c) (1980). This exemption is adapted from Wisconsin community-based residential facilities regulations. One source of support for exempting residential treatment facilities from the definition of a board and care home can be found in S. Segal & U. Aviram, *The Mentally Ill in Community-Based Sheltered Care* 280 (1978), in which board and care for mentally ill persons also are envisioned as one part of a bi-level community residential program:

> In accord with our notions regarding the type of service and who should get what type of service, we see the need for two basic types of facilities in the sheltered-care arena. First is the facility geared to be an ideal psychiatric environment and organized to deal with high levels of psychological disturbance. The second type would be a board and care home with primarily socially oriented programs. Individuals going to such board and care homes would be less overtly disturbed and more capable of using the social benefits of their environment.

Further, one of the most concise statements of the problem was contained in a memorandum from a licensing official with a state mental disability agency, who cautioned:

> [T]o maintain a sharp distinction between board and care facilities and halfway houses and residential treatment programs. To propose guidelines that could cover both types of settings would either result in regulations/standards that are too rigid and unrealistic for board and care facilities or too loose and unencompassing for treatment-oriented facilities. The latter possibility would be the most likely and therefore provides nontreatment programs with the opportunity to present themselves as something they are not. The two types of facilities provide very different types of services and therefore should fall under different sets of licensing regulations and certification standards.
>
> Memorandum from John P. King, Ph.D., Assistant Director, Program Standards and Evaluation, Virginia Department of Mental Health and Mental Retardation, to A. Mort Casson, Ph.D., Assistant Commissioner, Substance Abuse (Mar. 14, 1983).

6. *See, e.g.*, Fla. § 409.605 (West Supp. 1982); La. Rev. Stat. Ann. §§ 46:2121-2125.
7. *See, e.g.*, Fla. § 409.605; La. § 46:2124; Minn. Stat. Ann. § 241.63 (West Supp. 1983); Wash. § 70.123.030.

SECTION 3. OTHER DEFINITIONS.

As used in this Act:

(A) "administrator" means any person who has responsibility for day-to-day administration or operation of a board and care home;

COMMENT

The administrator of a home, often called the "operator," is usually the person responsible for managing the home. In a small home, the administrator also may be the licensee and provide personal assistance to a few persons in his or her own home.[1]

(B) "advocate" means a public or private officer, agency, or organization designated by state legislation, state plan, or the governor to represent the interests of residents and speak on behalf of residents of a board and care home, or on behalf of any categories of persons who may be residents of a board and care home;

COMMENT

An advocate includes any person or group that acts as a public representative for an individual resident or group of individuals who are residents of a board and care home. One example of an advocate as defined by the model act includes the protection and advocacy agency which has a federal mandate to represent the interests of developmentally disabled persons.[2] Another example is the long-term care ombudsman program, which is federally mandated to advocate on behalf of elderly persons.[3]

Since the names and composition of advocacy groups differ from state to state, the model act uses the term advocate to refer to an agency designated by the state to represent the interests of board and care residents. In adopting the model act, it is recommended that each state lists the specific name of each group which falls within the definition of advocate in the state's definition of advocate.

(C) "agency" means the state agency delegated exclusive authority by the legislature for carrying out the purposes and requirements of this Act, as provided in section 5;

COMMENT

The intent of the model act is to give one agency exclusive responsibility for implementing and administering the model act's provisions. Section 5 of the act delegates authority to the agency to carry out the act's purposes and requirements. To assist the agency in carrying out the provisions of the act, the act also requires the agency to consult with other agencies with expertise in certain areas covered by the act, including board and care plan and resident rights. The board and care council also provides a mechanism for coordination and communication among agencies.[4]

(D) "board and care council" means the interdisciplinary group appointed by the governor to advise the agency on matters of policy relating to board and care homes, as provided in section 16;

COMMENT

No comment necessary.

(E) "board and care plan" means a written description of the functional capabilities of an individual, the individual's need for personal assistance, and the services to be provided to meet the individual's needs, as provided in section 8;

COMMENT

No comment necessary.

(F) "conditionally permitted use" means a use that may not be appropriate as a matter of right throughout a zoning district, but which may be permitted consistent with the public health, safety, morals, and general welfare if regulated through conditions as to number, location, area, and conformity to building, fire, health, and safety standards;

COMMENT

A "conditionally permitted use" is a land use authorized in a particular zoning district only if certain requirements or standards are met and only after approval is given by the local zoning appeals board or other public body. The terms "conditional use," "special use," "special use permit," and "special exception" are other terms often used by political subdivisions to designate a "conditionally permitted use." "Conditionally permitted uses" are sometimes confused with "variances" that are granted normally only to relieve a particular hardship arising from application of a zoning ordinance.

(G) "imminent danger" means a danger which could reasonably be expected to cause death or serious physical harm to residents or staff immediately or before the imminence of such danger can be eliminated through the enforcement procedures as provided in sections 20 through 38;

COMMENT

"Imminent danger" is a description of certain violations which may be used by the agency in order to invoke expedited procedures. These include expedited procedures for notice of violations as provided in section 22.5, expedited procedures for notice of sanctions as provided in section 24.3, and expedited hearing procedures as provided in section 24.4.[5] The difference between violations that constitute an imminent danger and those that constitute a substantial probability of death or serious physical harm is one of time. The physical harm to residents or staff which is likely to occur from a violation which constitutes a substantial probability of death or serious harm may be the same as the physical harm likely to occur from a violation which constitutes imminent danger; the distinction is that an imminent danger violation is one in which the death or physical harm will happen immediately so that the agency is required to take emergency action, whereas a violation which has a substantial probability of death or serious physical harm will not result in death or serious harm before the agency has had the opportunity to use normal enforcement procedures.

(H) "licensee" means the holder of a license to operate a board and care home under this Act;

COMMENT

A "licensee" either may be an owner or a lessee of a board and care home, and also may be a person, corporation, or partnership. This definition should cover all possible entities which may obtain a license to operate a board and care home.

(I) "permitted use" means a use by right which is specifically authorized in a zoning district;

COMMENT

"Permitted use" is defined so as to make clear the intent of the zoning sections of the model act, i.e., to eliminate the exclusion and undue restriction of board and care homes. Thus, when "permitted use" treatment is mandated under this act, a political subdivision may no longer exclude or restrict a board and care home by treating it as a "conditionally permitted use."

(J) "political subdivision" means a municipal corporation, township, or county;

COMMENT

"Political subdivision" is defined as a generic term incorporating the subordinate political units of a state because of the variations in terminology used throughout the country. In adapting this model act for consideration by a legislature of a given state it is recommended that the official names of the state's political subdivisions be identified, i.e., county, municipal corporations, townships, boroughs, villages, etc., and then used appropriately.

(K) "resident" means an adult who resides in a board and care home and who receives lodging, meals, or personal assistance as provided in section 2. A resident does not include the licensee, administrator, or staff of a home or a member of the family of the licensee, administrator, or staff; and

COMMENT

Any person who receives food, lodging, or personal assistance from a board and care home as provided in the act is considered a resident of that home. Thus, a person who resides in a home and receives only room and board is considered a resident even if he or she does not receive personal assistance. However, the licensee, administrator, staff, or their family members who also may reside in the home are not considered residents.

(L) "service coordinator" means the person responsible for coordination of the board and care plan, as provided in section 8.4.

COMMENT

Under section 8.4 of the model act, a number of responsibilities for coordinating the preparation of the board and care plan are delegated to the service coordinator. The service coordinator performs many of the same functions in a case management system which are delegated to the case manager. The term service coordinator is used to emphasize the role of that individual as one who merely oversees the delivery of services to the board and care home resident and to avoid the connotation of a resident as a "case" that needs "management."

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1. Such homes often are referred to as adult foster care homes. In states where the board and care licensing statutes do not cover homes with a small number of residents, there is a certification or different licensing process for foster homes. *See infra* section 4.1, note 9 for a list of adult foster care licensing statutes.
2. 42 U.S.C. § 6012 (1981).
3. 48 U.S.C. § 3027 (1981).
4. Of one hundred-twelve (112) state board and care statutes surveyed by the board and care project, approximately one-quarter place licensing responsibility in the department of health, one-fifth in the department of social services (or an analogous agency), one-quarter in an umbrella human services agency, and one-fifth in a department of mental health or developmental disabilities. *See State Laws and Programs Serving Elderly Persons and Disabled Adults,* 7 Mental Disability L. Rep. 158, 173-180 (1983).
5. The language of the definition is adapted from Occupational Safety and Health Act, 29 U.S.C. § 662(a) (1976). Other federal statutes which contain language defining an imminent danger are, Toxic Substances Act, 15 U.S.C. § 2606(f) (1982); Product Safety Act, 15 U.S.C. § 2061(a) (1982); Coal Mine Health and Safety Act, 30 U.S.C. § 802(j) (Supp. 1981); and the Mining and Reclamation Act, 30 U.S.C. § 1291(8) (Supp. 1981).

   N.J. Stat. Ann. § 55-13B-11 (West Supp. 1982) defined imminent danger as "any violation of the provisions of this act, or any rules or regulations promulgated thereunder, which constitutes an imminent hazard to the health, safety or welfare of the occupants or intended occupants thereof, or of the public generally. . . ."

SECTION 4. SIZE AND CATEGORIES OF HOMES BASED UPON SIZE.

Section 4.1. Maximum Size [optional].

No board and care home shall house more than [thirty (30)] persons; except that, the maximum size requirement is waived for board and care homes with more than thirty (30) persons which were licensed as board and care homes prior to the effective date of this Act. Such homes shall be subject to the provisions of the Act upon the effective date of the Act.

COMMENT

The model act suggests a maximum number of thirty (30) persons who may reside in a board and care home. Maximum size is included as a substantive requirement similar to other requirements in the act rather than as part of the definition of a board and care home. If a licensee violates the requirement that a board and care

home may not serve more than thirty (30) persons, the licensee will be out of compliance and subject to the compliance procedures and enforcement sanctions of the act. It was determined that the maximum size limit should not be part of the definition of a board and care home so that exceeding this limit would not automatically exclude the home from the act's coverage.

Further, facilities with more than thirty (30) persons existing before the effective date of the act are grandfathered into the act's coverage. This decision recognizes that many residents now reside in facilities which serve more than thirty (30)[1] individuals and that it may be impractical to transfer such individuals to smaller homes.

By bracketing the number thirty (30), the act provides a suggested rather than a mandatory maximum size, although it is the intent of the act to support and encourage small facilities. The primary reason for bracketing the maximum size is to permit states flexibility in deciding upon a number appropriate to their needs. As discussed later, the precise figure thirty (30) is necessarily an arbitrary number. A state legislature desiring to establish a maximum figure may find that a larger number, such as thirty-five (35) or forty (40), is more consistent with the types of physical structures which currently predominate or might be constructed in the state. Thus, states have the option to select a higher number, although the act's choice of thirty (30) suggests that a significantly higher figure, such as fifty (50), seventy-five (75), or one hundred (100), would not be appropriate. States also may wish to establish a smaller maximum figure. Finally, states which may find it necessary politically to establish no maximum would be free to do so, since the bracketed maximum is only a suggested figure.

There are numerous justifications for imposing a maximum size limit. It is a fundamental premise of this act and widely accepted in the fields of mental health and retardation that, all else being equal, small facilities are necessary to provide a homelike environment.[2] Commentators addressing the design of facilities for a number of at-risk populations have concluded that large facilities lead to "inward rather than outward direction of resident and staff socialization, and therefore . . . foster insulation from society, [and] institutionalization of attitudes and behavior."[3] Further, various experts believe that the "management of large numbers of individuals, especially if these are of reduced behavioral adequacy, is difficult and perhaps impossible without regimentation and loss of individuality; thus, in large facilities, dehumanizing management tends to develop."[4] Studies also have shown that large facilities tend to breed certain types of conditions, such as abuse of residents, inadequate staffing, and isolation of residents; after a certain period of time, these conditions can lead to deterioration of the individual's skills and general well-being.[5] In short, large facilities tend to contribute to an institutionalized environment.[6]

An additional factor which argues in favor of setting a maximum size is that large facilities and their residents are less likely to be accepted and incorporated into the community. To fulfill the goal of "integration" (i.e., participation in the mainstream of culture) residential services must, by definition, be small.[7] This is because most communities are not able to absorb large numbers of persons who may not be able to live independently in the community in terms of recreation, transportation, shopping, and socialization.[8]

Although the act provides a suggested maximum size, arguments have been made for not setting a size limit. First, it has been argued that limitations on size may decrease the number of board and care homes because smaller homes are less profitable; some say that operating and development costs are reduced in large facilities through central purchasing of food, supplies, equipment and furnishings, standardized recordkeeping, and centralized planning.[9] It is not clear, however, that smaller facilities are necessarily less profitable or economically attractive to operators.[10] In fact, they may be less costly. Moreover, economic considerations alone should not dictate the decision regarding the size of board and care homes. As one advocate stated, "[c]ommunity care should be provided because it is better--not because it is cheaper."[11]

Second, it has been contended that large facilities have benefits over small homes, such as greater ability to recruit specialists or qualified staff and to provide a wider array and variety of services and activities.[12] Third, it has been advocated that while small facilities generally provide a better quality of life, other factors, such as staff turnover, low staff/resident ratio, geographical location, or other demographic variables independent of size may be greater or at least equal determinants of the quality of care or life.[13] Fourth, a study comparing very small homes (four (4) to six (6) residents) and facilities with thirty (30) and fifty (50) residents respectively found, among other things, that in the two larger facilities, residents were more independent.[14]

Fifth, it might be argued that an upper size limit will restrict the supply of board and care homes and that operators of board and care facilities with more than the maximum number of residents may choose to operate as boarding homes. There already is concern regarding the large numbers of boarding homes (in which only room and board and provided) in which residents need but are not receiving personal assistance. This situation might be exacerbated by designating an upper limit for board and care homes. The problem may be ameliorated, however, by the decision to include the size maximum as a requirement of the model act, rather than as an element of the definition of a board and care home. The model act gives special attention to homes which exceed the maximum by requiring the agency to help homes reduce the number of residents through transfer assistance.

A statutory maximum also may be challenged as a constitutional violation of the Fourteenth Amendment's equal protection clause. However, an analysis of current constitutional principles regarding social and economic legislation suggests that such a challenge would not be successful.[15]

A final disadvantage regarding adoption of a maximum size involves the status of existing board and care

facilities with more than the maximum number of residents. As noted before, this section grandfathers such facilities into the act's coverage and requires them to meet the same standards as large homes (seventeen (17) to [thirty (30)] persons) must meet.

Despite these arguments, providing no maximum size was rejected because of the act's underlying philosophy in favor of small homes. Although one study found that most board and care facilities serve under thirty (30) persons, it also revealed that most residents live in larger facilities.[16] As has happened under most current statutes which set no maximum, a majority of residents probably would continue to reside in larger facilities if no upper limit were set.

The decision to specify a suggested rather than a mandatory maximum size was due to the difficulty in choosing a particular number and to the desire to give states flexibility in selecting an upper figure. Authorities are not unanimous on the precise optimum size of a residential facility. In the field of mental retardation, an upper limit of six (6) or eight (8) residents is suggested by many authorities, because it is considered roughly comparable to a nuclear family.[17] A number of licensing statutes governing residential facilities for mentally retarded or mentally ill persons set a maximum size, most of which designate eight (8) as the upper limit; however, one law sets the maximum figure at twelve (12), a few at sixteen (16), and one sets a maximum of twenty (20).[18] In addition, a number of adult foster care statutes provide maximum size limits, such as four (4), five (5), six (6), or eight (8) residents.[19]

The number thirty (30) was chosen for several reasons. First, the figure thirty (30) was chosen not as an ideal size, but to establish a ceiling above which a home is considered to develop more institutional qualities. Indeed, it is believed that as residences become larger than eight (8) persons, they often begin to develop the negative characteristics and incrementally lose the quality of a homelike environment. The model act encourages the development of homes with far fewer residents than thirty (30), especially those in the two (2) to eight (8) person classification identified as "small homes" by this section of the act. Throughout the act, small homes are granted certain exceptions to the act's requirements and are given an opportunity to seek a variance from other requirements. Further, large homes and homes with more than thirty (30) persons must meet additional requirements which small homes need not meet.

Second, a limit of thirty (30) is consistent with the current size of most board and care and other community residential facilities. Surveys of residences serving elderly, developmentally disabled, and mentally ill persons show that a high percentage of such residences serve less than thirty (30) persons.[20] The upper limit of thirty (30), therefore, reflects a majority of existing board and care facilities, but still sets a relatively small number. The act, thus, seeks to accommodate existing structures, while advocating a smaller size of eight (8) or fewer residents, which conforms to what is considered "normal and human in society."[21]

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1. Horizon House Institute, *Summary and Report of the National Survey of State Administered Domiciliary Programs* (Philadelphia, Pa. 1980).

2. *See* W. Wolfensberger, *The Principle of Normalization in Human Services* 81 (1972). *See also* G. Fairweather, D. Sanders, H. Maynard, D. Cressler, D. Black, *Community Life for the Mentally Ill: An Alternative to Institutional Care* (1969); Budson, *Sheltered Housing for the Mentally Ill: An Overview,* 3 McLean Hosp. J. 140 (1979).

   One of the major aspects of the "normalization principle" in group residential services is smallness. W. Wolfensberger, at 81. The normalization principle originally was conceived in the field of mental retardation in Scandinavia. Its first American articulator, Wolf Wolfensberger, has noted that it may be applied to any group, especially in the areas of mental illness, geriatrics, and corrections as well as mental retardation. W. Wolfensberger, *supra* note 2, at 79-80 (1972). Normalization has been defined as "making available to the mentally retarded [or other individuals] patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." Nirje, *The Normalization Principle,* in *Changing Patterns in Residential Services for the Mentally Retarded,* President's Committee on Mental Retardation, at 181 (R. Kugel and W. Wolfensberger eds. 1969).

3. W. Wolfensberger, *supra* note 1, at 81-82 (the reader is directed to the references cited therein).

4. *Id.*

5. In *Halderman v. Pennhurst,* 446 F. Supp. 1295, (E.D. Pa. 1977), *aff'd,* 612 F.2d 84, *rev'd & remanded,* 451 U.S. 1 (1981), the federal district court concluded from testimony regarding the conditions at Pennhurst, a residential institution for mentally retarded persons in Pennsylvania, that a mentally retarded person's right to habilitation cannot be met in a large institution such as Pennhurst. *See also* Balla, *Relationship of Institution Size to Quality Care: Review of the Literature,* 81 Am. J. Mental Deficiency 117, 119 (1976) (the reader is directed to references cited therein).

6. Largely as a result of abusive treatment received by mentally ill and mentally retarded persons in state hospitals, the term institution has developed a negative connotation that is different than its strict meaning of "(a) an organization having a social education, or religious purpose, as a school, church, hospital, reformatory, etc. (b) the building housing such an organization." *Webster's New World Dictionary* 730 (2d. ed. college 1980). This negative, specialized connotation of institution has made it difficult to define. Wolfensberger defines institution as a "congregation of persons into residential groups larger than those typically found in the community—in North American society, the most typical group residing together in the community is the nuclear family, which rarely exceeds six to eight members." W. Wolfensberger, *supra* note 1, at 80. For a thorough discussion of the history of institutions as a model for care of mentally retarded, mentally ill, and elderly persons, *see* W. Wolfensberger, *supra* note 2; Budson, *supra* note 2.

7. W. Wolfensberger, *supra* note 2, at 48.

8. *See* W. Wolfensberger, *supra* note 2, at 82. In the first literature available in the United States on the normalization principle, Nirje states that "the sizes of facilities should conform to what is normal and human in society . . . [and] a facility for the retarded should never be intended for a larger number of persons than the surrounding neighborhood readily assimilates in its regular everyday community life." *See* Nirje, *supra* note 3, at 185; *Halderman,* 446 F. Supp. at 1302-18.

9. This is a view often espoused by health care provider associations and some licensing agencies.

10. Kugel, *Why Innovative Action?,* in *Changing Patterns in Residential Services for the Mentally Retarded,* President's Committee on Mental Retardation, at 7 (R. Kugel & W. Wolfensberger eds. 1969); W. Wolfensberger, *supra* note 2, at 81.

11. W. Oriol, *Housing the Elderly Deinstitutionalized Mental Hospital Patient in the Community* 103 (International Center for Social Gerontology, Inc. Washington, D.C., 1980).

12. *See supra* note 9.

13. *See* Balla, *supra* note 5, at 118, 120.

14. Bjaanes & Butler, *Environmental Variation in Community Care Facilities for Mentally Retarded Persons,* 78 Am. J. Mental Deficiency 429 (1974).

15. The equal protection clause of the fourteenth amendment imposes restraints on legislative classifications or differentiations. The basic requirement of equal protection is that there must be some rational connection between the legislative classification and objective, or legislative means and ends. The standard applied to social and economic legislation is that the classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced, shall be treated alike." G. Gunther, *Constitutional Law* 676-77 (10th ed. 1980). The Supreme Court has frequently held that drawing distinctions is an unavoidable legislative task and that a statutory discrimination will not be set aside "if any state of facts reasonably may be conceived to justify it." *Id.*

    It seems likely that a regulatory statute such as the model act would be considered social and economic legislation, and based upon the above, the statute's exemption of facilities with over 30 residents probably would not be challenged successfully under the rational basis standard. Using this standard, the legislative determination to exempt large facilities should be considered rationally related to the purpose of providing a normal, homelike environment for residents of board and care homes. The goal of providing such an environment in a small facility is well-supported by accepted theories in the fields of mental health, mental retardation, and aging, as well as consumer preferences and economic considerations. *See supra* section 4.1, Comment.

    A Michigan case was found in which an operator claimed that the adult foster care statute's maximum limit of six residents was a violation of equal protection. *Feldman v. Dept. of Soc. Serv.,* 269 N.W.2d 319 (Mich. Ct. App. 1978). Since neither a fundamental interest nor a suspect classification was involved, the court applied the traditional deferential review equal protection standard, and held that the legislation met the rational basis test. The plaintiff appeared to be attempting to fall within the adult foster care category for six or fewer persons, because fewer physical requirements must be met for that category. The operator or owner, however, was not prevented from providing board and care services under a different category to a greater number of residents, but a home which is in a different category which serves more residents would have to satisfy stricter requirements in certain areas. Under the Michigan statute, there are five categories of homes according to size, and the largest classification has no upper limit. *See infra* section 4.2, note 1.

16. *See National Survey, supra* note 1, which indicated that over 50 percent of all residents lived in community facilities serving 30 or more residents. *See also* S. Segal & U. Aviram, *The Mentally Ill In Community-Based Sheltered Care* 117 (1978), in which a recent survey of residential facilities for mentally ill persons in California found that while only 6 percent of the community residences house more than 50 persons, one-half of the residents resided in large facilities.

17. *See, e.g.,* W. Wolfensberger, *supra* note 1, at 80. *See also* B. Sales, D. Powell, R. VanDuizend, *Model Statute–An Act to Establish the Right to Locate Community Housing for Developmentally Disabled Persons in the Residential Neighborhoods of This State* in *Disabled Persons and the Law* (1982). *See also* Balla, *supra* note 5, at 119, in which a national survey of group homes is cited as finding that facilities with fewer than 20 residents were more normalized than facilities with more than 20 residents.

18. *See* Hawaii Rev. Stat. § 346-1 (Supp. 1981) (eight); Ill. Ann. Stat. ch. 111½ § 4183 & ch. 91½, § 623 (Smith-Hurd Supp. 1982-1983) (twenty & eight); Md. Health-General Code Ann. § 7-101(h)(2) (Supp. 1983) (eight); Mont. Code Ann. §§ 53-20-301 (1981) (twelve); N.J. Stat. Ann. §§ 30:11B-2 (West 1981) (twelve); N.C. Gen. Stat. §§ 131D-2(a)(6) (Supp. 1983) (nine); Ohio Rev. Code Ann. §§ 5123.17 *et seq.* (Page 1981) (eight); W. Va. Code § 27-17-1 (Supp. 1983) (eight).

19. *See infra* section 4.2, note 3.

20. *See* Horizon House Institute, *Summary and Report of the National Survey of State Administered Domiciliary Programs* (Philadelphia, Pa., 1980), which showed that about 60 percent of the facilities surveyed housed 27 or fewer residents. *See also* R. Bruininks, F. Hauber, M. Kudla, *National Survey of Community Residential Facilities and Residents in 1977* (University of Minnesota, 1979) [hereinafter cited as *National Survey*], which indicated that only 9 percent of community residences for mentally retarded persons housed 30 or more residents.

21 Nirje, *supra* note 2, at 185.

Section 4.2. Categories of Homes Based upon Size and Minimum Size.

(A) Board and care homes shall be categorized as:

- **(1) small homes, with two (2) to eight (8) persons;**
- **(2) medium homes, with nine (9) to sixteen (16) persons;**
- **(3) large homes, with seventeen (17) to thirty (30) persons; and**
- **(4) homes with more than thirty (30) persons, as provided in section 4.1.**

(B) As used in this section, the term "persons" means individuals who live in a board and care home. "Persons" include the licensee, adminstrator, staff, and their family members if they live in the home.

COMMENT

The model act groups board and care homes into four categories. This categorization serves several purposes.[1] First, it recognizes the existence of a variety of home sizes, and provides a convenient framework for referring to different size homes. Second, and most important, it provides an organizational system for distinguishing homes where the size may influence the application of different requirements. There is a strong social policy rationale for imposing additional or special requirements upon homes in the categories of "large homes" and "homes with more than thirty (30) persons," and for relieving small homes of certain requirements. As a practical matter, larger homes should be expected to comply with more stringent requirements relating to fire safety, physical structure, and sanitation in order to ensure the health and safety of residents. This also should have the effect of discouraging the development of such homes and inducing the growth of small homes which do not have to comply with such stringent standards.

Minimum Size

By limiting the definition of a board and care home to facilities which house "two (2) or more" residents, the act excludes residences providing care for only one adult. The primary reason for excluding one-resident homes is to encourage care for an elderly, mentally disabled, or physically disabled person by a close friend. Requiring a home for one person to carry out the procedures and meet the standards for obtaining a license under the act might dissuade an otherwise willing individual from

undertaking the care of another.

In addition, by excluding one-resident homes, the model act attempts to balance two competing and important interests. One interest involves the desire to protect each individual who resides in a home which provides board and care services, whether or not the home cares for one resident or many residents. This recognizes that abuse, neglect, or poor conditions may exist in any residential setting regardless of size. Some would argue that this interest dictates that no home should be excluded from regulation. The other interest involves the belief that very small homes with one or a few residents are to be encouraged, and that regulation or licensing requirements may be a disincentive to establishing or maintaining such homes. This interest argues in favor of excluding homes with one resident, or very few residents.

Although the decision was made to exclude one-resident homes from the act's coverage, there are ways to avoid the disadvantages of such homes not being licensed under the act. First, in some states, protective services legislation addresses abuse or neglect of elderly persons and disabled adults.[2] Further, a small board and care home with one or even a few residents is likely to be a home in which the licensee cares for one or a few residents in his or her own residence. Sometimes called "adult foster care homes," they often are subject to regulation, either by another statute or by agency regulation or policy.[3]

Many state licensing statutes do not regulate board and care homes with a small number of residents.[4] Drawing the line at one resident may seem over-inclusive because it discriminates between homes which serve one resident and other small homes which only serve two (2), three (3), or perhaps four (4) residents. Nevertheless, the exclusion of only one-resident homes was considered a compromise, especially since certain requirements of the act are waived for small homes with two (2) to eight (8) persons, and such homes may seek a variance from other requirements under the model act.

A strong argument for regulating very small homes with two (2), three (3), or four (4) persons is that licensing creates viability and respectability, and that failure to include such homes may create the situation which the act intends to avoid, namely, discouraging the establishment of small homes.[5] The concern of driving such homes out of business because of licensing requirements may seem valid when those requirements are detailed and lengthy such as in the model act. While the act may appear over-regulatory, implementation of many of the act's provisions actually involves the agency's obligations and responsibilities, rather than those of the board and care home.

1. *See State Laws and Programs Serving Elderly Persons and Disabled Adults,* 7 Mental Disability L. Rep. 158, 173-180 (1983). *See, e.g.,* Mich. Comp. Laws Ann. § 400.703 (West Supp. 1982) which includes the following classifications: 1-6; 7-12; 13-20; and 21 and above; Fla. Stat. Ann. § 393.063 (West Supp. 1982) which classifies group homes for the developmentally disabled as follows: 1-3; 4-16; and 17 and above. The model act's categories correlate with the sizes of homes for the Fire Safety Evaluation System (FSES) proposed by the National Bureau of Standards (it applies to homes of up to 16 persons). *See infra* section 12.4 & Comment.
2. *See supra* section 2.6, note 2.
3. *See* Cal. Health & Safety Code § 1502 (1979 & West Supp. 1982); Colo. Rev. Stat. § 26-1-111(2)(j) (1982) (certification only); Fla. Stat. Ann. § 393.063(12) (West Supp. 1982) (1-3 developmentally disabled persons); Hawaii § 346-1 (Supp. 1981) (one to eight persons); Ind. Code Ann. § 16-14-4-1 (Burns 1983) (for any number of mentally ill persons); Kan. Stat. Ann. § 39-923 (1981) (1-2 persons); Me. Rev. Stat. Ann. tit. 22, § 7901 (Supp. 1982) (four or fewer persons); Mich. Comp. Laws Ann. § 400-703(5) (West Supp. 1982) (6 or fewer persons; licensee must be member of household and an occupant of the residence); Mont. § 53-5-302(1) (4 or fewer persons); N.D. Cent. Code § 50-11-06.1 (4 or fewer adults); N.Y. Soc. Serv. Law § 460 (McKinney Supp. 1982-1983) (4 or fewer adults); N.Y. Mental Hyg. Law § 31.03 (McKinney § 1978) (6 or fewer mentally disabled persons); Ohio § 5103.30 (5 or fewer adults); S.D. Codified Laws Ann. § 28-1-39 (Supp. 1983) (any number of public assistance recipients); Wash. Rev. Code Ann. §§ 74.08.044,045, .15.010 (1982) (for any number of public assistance recipients and 2 developmentally disabled persons).
4. A survey by the Board and Care Project of board and care licensing statutes found a majority of statutes specify a minimum size, exempting homes with one, two, three, four, or five residents. *See, e.g.,* Ariz. Rev. Stat. § 36-401 (Supp. 1982-83) (five or more); Idaho Code § 39-3301 (Supp. 1982) (three or more); Ind. Code Ann. § 16-10-4-2 (Burns 1983) (four or more); Mass. Ann. Laws ch. 111, § 71 (Michie/Law Coop. Supp. 1982) (four or more); Nev. Rev. Stat. § 449.005 (1983) (four or more); Or. Rev. Stat. § 443.400(8) (1981) (six or more); Wash. Rev. Code Ann. § 18.20.020 (Supp. 1982) (three or more). In these states, however, there may be a less formal regulatory system for very small homes. *See infra* note 3.
5. Interview with Douglas Nelson, member of Commission on Legal Problems of the Elderly, American Bar Association and director, Wisconsin Department of Health and Social Services (Sept. 24, 1983).

SECTION 5. DELEGATION OF RULEMAKING, ADJUDICATIVE, AND INVESTIGATIVE AUTHORITY TO AGENCY.

(A) The agency shall have authority to carry out the purposes and requirements of this Act through:

(1) rulemaking;

(2) adjudication; and

(3) investigation.

(B) The agency shall exercise its authority to make rules by promulgating regulations as specified in this Act and to carry out the purposes and requirements of the Act.

(C) The agency shall exercise its authority to adjudicate as specified in this Act, by granting variances, imposing administrative sanctions and holding hearings, and whenever necessary to carry out the purposes and requirements of the Act.

(D) The agency shall exercise its authority to investigate as specified in the Act, by investigating applications for a license and renewal of a license, inspecting homes, and issuing subpoenas for persons and records, and whenever necessary to carry out the purposes and requirements of the Act.

(E)The agency may request from any other agency such

information as the agency may require for proper and effective exercise of its rulemaking, adjudicative and investigative authority under this section.

COMMENT

This section of the model act gives the agency authority or power to carry out the act's provisions through promulgation of regulations, adjudicative proceedings, and investigations. While certain sections of the act specify that the agency shall exercise these powers, this section also allows the agency to exercise its authority at other times not specifically mentioned in the act when the agency may consider it necessary to implement the act's provisions.[1]

Rulemaking and adjudication (also called "agency action," "contested case," or "adjudicatory proceeding") are defined in state administrative procedure act (APA) provisions. Rulemaking generally is defined to mean the process for formulation and adoption of a rule.[2] The federal APA, the model state APA, and some state APA's define adjudication or agency action broadly to encompass any formal or informal agency action; however, some state APA's define the term narrowly, providing that an adjudication or contested case is analogous to a court decision in which the rights and duties of particular identified parties are determined.[3] Under state APA's with broad definitions of adjudication, investigative functions would be included. Because some state APA's have narrow definitions, however, the term investigation specifically is included in this section to ensure that in such states, the agency has authority to take any action under the model act, in addition to formal rulemaking and adjudicative proceedings, to carry out the act's purposes and requirements. Actions which are considered to be within the agency's investigative powers and which would not constitute formal adjudicative proceedings include investigations of applications for a license or license renewal, inspections, and issuance of subpoenas in connection with inspections or other informal or investigative actions.

Delegation of rulemaking authority to an administrative agency means that the legislature is conferring its legislative power upon an administrative agency. Although the U. S. Constitution vests exclusive power to legislate in Congress and the U. S. Supreme Court has stated such power cannot be delegated, the Supreme Court has held such delegations by Congress to federal agencies unconstitutional only twice in U.S. history.[4] The court in fact has stated that legislative power may be delegated if there are meaningful standards to guide agencies in carrying out their delegated power.[5]

Unlike congressional delegations, however, delegations of legislative authority to agencies by state legislatures have been invalidated by state courts.[6] Courts have held that a legislature may not delegate its power to make the law, although it may grant authority to the agency to execute or administer the law.[7] There have been successful challenges to legislative delegations involving statutes which give an agency authority to impose sanctions or to take certain enforcement actions, such as civil penalty proceedings or a nursing home rating system, based upon a lack of statutory standards for their imposition or enforcement.[8] For example, state courts have held that it is an unconstitutional delegation of legislative power to an agency to determine the amount of a civil penalty if such power is granted within very broad limits,[9] without legislative definition of the conditions the agency must find before assessment,[10] or without specifying a fixed amount in the statute.[11]

Other state courts, however, have upheld an agency's authority to assess a civil penalty involving a wide-ranging, variable amount despite a lack of statutory standards to guide the agency in determining the amount of the penalty and without addressing the lack of standards.[12] A legislative delegation to an agency under a nursing home licensing statute also was upheld because the regulations were subject to notice and comment rulemaking procedures.[13]

State courts further have upheld delegations of authority to agencies to administer a statute where such statutes provide very broad policies or standards, such as a general purpose clause.[14] For example, in one state decision involving a nursing home licensing statute, the court considered the statute's broad purpose clause to be a "sufficiently specific and clear" standard to guide the agency "in light of other statutory standards which have been upheld."[15] The court, in part, based its holding upon the agency's greater competency and familiarity with the substantive issues than are possessed by individual legislators, and the need for flexibility in nursing home regulation.[16]

For a number of reasons, there should not be a successful constitutional challenge to the model act's delegation of legislative authority to the agency to promulgate regulations. First, the purpose clause provides a detailed and clear description of the policy objectives of the act. Second, the regulations of the agency are subject to notice and comment rulemaking procedures under the act. Third, the standards or requirements of the act in all areas are detailed and comprehensive, leaving little discretion to the agency except to carry out the act's provisions by adopting regulations.

The model act's delegation of adjudicative powers to the agency also should be constitutional. The issue is whether a delegation of judicial authority violates the separation of powers doctrine by giving the executive branch power which state constitutions or the U.S. Constitution vest in the judicial branch. The U.S. Supreme Court has never held that judicial power was improperly vested in a federal agency, and most state courts have upheld delegations of judicial authority or adjudicatory functions to agencies.[17]

1. Board and care licensing statutes usually delegate authority to the agency to adopt rules. Some statutes provide that the agency may or shall adopt such rules or regulations necessary to carry out the provisions of the statute. Other statutes enumerate specific substantive areas of the statute for adoption of regulations. *See State Laws and Programs Serving Elderly Persons and Disabled Adults*, 7 Mental

Disability L. Rep. 158, 173-80 (1983).

2. *See* Model Administrative Procedure Act § 1.102(11) (National Conference of Commissioners on Uniform State Laws 1981).

3. Broad definitions are found in *id.* & 5 U.S.C. §§ 551 (4) & (5) (1982). The federal APA defines "adjudication" as agency action other than rulemaking, including licensing. The model state APA's definition of "agency action" is: "(i) the whole or a part of a rule or an order; (ii) the failure to issue a rule or an order; or (iii) an agency's performance of, or failure to perform any other duty, function, or activity, discretionary or otherwise." Model APA § 1-102(2). *See, e.g.*, Cal. Govt. Code § 11500(f) (West 1980); Neb. Rev. Stat. § 84-901(3) (1981) for narrow definitions.

4. K. Davis, *Administrative Law Treatise* 204 (1978). One state court stated that "[t]he non-delegation doctrine is virtually dead in the federal courts . . . . State courts, however, adhere to this doctrine, although not uniformly." *See e.g., Northern Lights Motel Inc. v. Sweaney,* 561 P.2d 1176, 1181 n. 4 (Alaska 1977).

5. *United States v. Shreveport*, 287 U.S. 77, 85 (1932). *See also* K. Davis, *supra* note 4, at 151.

6. K. Davis, *supra* note 4, at 204-06.

7. *See, e.g., Levine v. Whalen,* 384 N.Y.S.2d 721, 723 (1976). *See also* K. Davis, *supra* note 4, at 204.

8. *See High Ridge Management Corp. v. State,* 354 So. 2d 377 (Fla. 1978) (invalidating a statutory provision for a rating system which gave the agency authority to establish criteria by regulation for determining the rating of a nursing home without guidelines); *County Council for Montgomery Co. v. Investors Funding Corp.* 312 A.2d 225, 246 (Ct. App. Md. 1973) (civil penalty provision held unconstitutional delegation of legislative authority without statutory standards to guide agency in determining amount); *Broadhead v. Monaghan,* 117 So. 2d 881 (Miss. 1960) (struck down statutory provision giving tax commission authority to impose variable penalty as unconstitutional legislative delegation without statutory standards or conditions for assessment; excellent discussion of legislative and judicial function); *Tite v. State Tax Commission,* 57 P.2d 734 (Utah 1936) (invalidated tax commission authority to impose penalty as violation of separation of powers and unconstitutional delegation of legislative authority to agency to determine amount, although authority to impose penalty was constitutional delegation of judicial authority).

9. *County Council,* 312 A.2d at 246.

10. *Broadhead,* 117 So.2d at 895.

11. *Southern Illinois Asphalt Co. v. EPA,* 303 N.E.2d 606, 614 (Ill. Ct. App. 1973), implicitly overruled by *City of Waukegan v. Pollution Control Board,* 311 N.E.2d 146 (Ill. 1974).

12. *See Lackner v. Perkins,* 154 Cal. Rptr. 138 (Cal. Ct. App. 1979); *City of Waukegan,* 311 N.E.2d 146; *Wycoff Co. v. Public Serv. Commn.,* 369 P.2d 283 (Utah 1982).

13. *Boswell, Inc. v. Harkins,* 230 Kan. 738 (1982).

14. *See Levine v. Whalen,* 384 N.Y.S.2d at 724 and cases cited therein; *Boswell,* 230 Kan. at 741.

15. *Levine,* 384 N.Y.S.2d at 724. The court also stated that " . . . in many cases, the legislature has no alternative but to enact statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details . . . . More to the point, it is not always necessary that license legislation prescribe a specific rule of action and, where it is difficult or impractical for the legislature to lay down a definite and comprehensive rule, a reasonable amount of discretion may be delegated to administrative officials." *Id.* at 723.

16. *Id.* at 724.

17. *See* K. Davis, *supra* note 4, at 186. *See also* the U. S. Supreme Court's decision in *Atlas Roofing Co. v. OSHA,* 430 U.S. 442 (1977), which held that where public rights are being litigated, "the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.* at 450. As Professor Davis noted, "[n]ot one word was said in the *Atlas* opinion about the question whether the judicial power to find facts from evidence and to apply the law can be exercised by administrators rather than judges appointed pursuant to Article III of the Constitution; the Court *assumed* such power can be exercised . . . ." K. Davis, *supra* note 4, at 189.

See also County Council, 312 A.2d 225 (adjudicatory powers of landlord-tenant commission upheld as not unconstitutional delegation of judicial power or violation of separations of powers under Maryland constitution, except authority to assess civil penalty held unconstitutional delegation of legislative power because of total absence of statutory standards to guide agency in determining amount); *City of Waukegan,* 311 N.E.2d 146 (upheld civil penalty provisions of state EPA as constitutional under separation of powers clause); *Rody v. Hollis,* 500 P.2d 97 (Wa. 1972) (upheld state human rights commission damage award as not unconstitutional delegation of judicial or legislative power); *Wycoff Co.* 369 P.2d 283 (upheld quasi-judicial power of public service commission to impose monetary penalty). *See also* cases cited in *City of Waukegan,* 311 N.E.2d at 150. *But see State ex Rel Lanier,* 164 S.E. 2d 161 (N.C. 1968), which held that an agency's authority to assess a variable civil penalty was an unconstitutional delegation of judicial power, but upheld the agency's power to revoke a license and hold hearings as "reasonably necessary" to carry out the act's purpose.

Courts have stated that the doctrine of separation of legislative, executive and judicial powers does not prohibit exercise of functions of one department by another, but means that "the whole power of two or more departments may not be lodged in the same hands." *City of Waukegan,* 311 N.E.2d at 148. It generally is recognized now that the blending of powers in a single administrative body is desirable and acceptable. As one Maryland court noted:

> It became apparent that the complex problems of modern social, economic and industrial life for ever-increasing numbers of knowledgeable people could be solved or settled more expeditiously, effectively, cheaply and simply by administrative processes than by the traditional executive, legislative and judicial processes, because the blending of powers in one agency . . . produces an expertise and a superior ability both correctly to evaluate specialized questions and to supply correct answers to these questions . . . .
> *County Council,* 312 A.2d at 242.

What must be ensured is that "the residual power of check remains in the judiciary." *Id.* One commentator notes:

> As a general rule, delegation to administrators or agencies of the quasi-judicial power to adjudicate rights or to revoke privileges such as licenses is not invalid so long as there is an opportunity for judicial review of the administrative action. Such judicial review normally permits an aggrieved party to contest the fairness of the procedure used, the constitutionality of the substance of the regulatory statute and implementing rules and regulations, the correctness of the administrator's interpretation of the statute under which he operates, and whether or not his decision was arbitrary. In short, if the judiciary is given an adequate opportunity to review what has been done, the principle of separation of powers—or due process of law, if you will—is generally satisfied.
> *City of Waukegan,* 311 N.E.2d at 152, citing Braden & Cohn, *Illinois Constitution: An Annotated and Comparative Analysis* (1969).

Moreover, procedural protections in the form of notice and an opportunity to be heard to contest administrative imposition of civil penalties provides an additional factor establishing the constitutionality of such a delegation. *Rody,* 500 P.2d at 100. Further, agency decisions, such as assessment of penalties, are not judgments and may only be enforced by courts. It has been said that judicial power is not only the power to decide but to pronounce judgment and to carry it out. 1 Am. Jur. 2d *Administrative Law* § 173, at 977 (1962). Lastly, quasi-judicial functions conferred upon an agency

have been upheld where such functions "are designed to serve a general public purpose." *County Council,* 312 A.2d at 243, 245; *C.M. Ford v. EPA,* 292 N.E.2d 540, 544 (Ill. 1975).

SECTION 6. PROCEDURES FOR RULEMAKING AND ADJUDICATION.

(A) Except where provided otherwise in this Act, agency rulemaking and adjudication procedures shall be governed by the state Administrative Procedure Act.

(B) During the initial stages of development of proposed regulations:

(1) the agency shall provide notice of the development of proposed regulations to the board and care council and other groups that the agency may find appropriate. The notice shall state the subject of the regulations under consideration and solicit written recommendations regarding their form and content.

(2) Upon receiving recommendations as provided in paragraph (1), the agency shall either adopt the recommendations or issue a concise statement to the board and care council or other group that provided the recommendations setting forth the reasons for not adopting the recommendations.

COMMENT

The model act, like many state board and care licensing laws, incorporates by reference state administrative procedure act rulemaking and adjudication provisions.[1] This approach ensures uniformity with respect to the fundamental administrative procedures of state agencies.[2] It makes it easier for people to interact with different state agencies and to be aware of their procedural rights.[3] It also saves the state money by avoiding the duplication of effort that is involved when each agency must ascertain the nature and extent of its minimum procedural obligations.[4]

Most states have provided for uniform administrative rulemaking and adjudication procedures through enactment of an administrative procedure act. Many states have adopted, in full or with some modification, the Revised Model State Administrative Procedure Act (model APA), which provides for notice and comment in rulemaking and adjudication proceedings in contested cases.[5] With only a few exceptions, states that have not adopted the model APA provide for notice and comment rulemaking and adjudication procedures in their administrative procedure legislation.[6] In a few states, uniform administrative rulemaking procedures have been enacted, but the states have chosen not to enact uniform adjudication procedures. Rather, these states include specialized adjudication procedures in individual laws when necessary.[7] If a state without uniform adjudication procedures adopts the model act, that state will have to enact procedures consistent with this act.

Most administrative procedure acts establish at least a three-step process for notice and comment rulemaking: (1) a procedure for giving advance notice to affected persons; (2) a mechanism for citizens to provide their views prior to final agency action; and (3) a procedure for general dissemination of the adopted rules in order to inform those affected of their rights and obligations.[8] These procedures assure that agencies will receive the information and opinions that can be supplied by persons whom the regulations will affect.[9]

The model act expands traditional notice and comment rulemaking, however, by requiring solicitation of recommendations from the board and care council and other appropriate groups during the initial development of regulations.[10] This requirement provides for valuable involvement of state agencies responsible for the regulation of board and care homes or the provision of services to board and care residents, as well as board and care home residents, licensees, and administrators.[11]

Under the model act, state administrative procedure act adjudication procedures apply when a board and care home requests a hearing to contest the imposition of an administrative sanction by the agency.[12] However, residents of the home may be threatened by the conditions that are the subject of the challenged administrative sanction. Some state administrative procedure acts and board and care licensing statutes contain the procedures discussed below, which provide for greater protection of residents and prompt resolution of the controversies at issue.[13]

The federal Administrative Procedure Act,[14] the model APA,[15] and many state administrative procedure acts[16] authorize informal disposition of contested cases by stipulation or consent agreement. States with administrative procedure acts that do not contain a consent agreement provision may wish to revise their board and care licensing laws to include one. The use of consent agreements maximizes the effect of limited law enforcement resources,[17] avoids the risks and costs associated with full-scale hearings and litigation,[18] and increases the likelihood of voluntary compliance.[19]

The agency and the home can enter into a consent agreement prior to or during an administrative hearing. The agency may agree to withdraw or modify a sanction conditioned upon the home's agreement to take specific steps to safeguard the health and safety of its residents. If the home violates the terms of the agreement, the agency may seek its enforcement in court.

The following procedures, which appear in several board and care licensing statutes, depart from the uniform adjudication procedures of state administrative procedure acts. They impose expedited procedures for scheduling a hearing, issuance of a decision following a hearing, and a home's filing of a petition for judicial review.[20] Placement of reasonable but prompt time frames upon the home and the agency promotes a quicker resolution of the issues which gave rise to imposition of the sanction.

A final provision which a state might want to incorporate into its board and care licensing statute relates to civil penalties and can increase the effectiveness of this sanction as an enforcement mechanism.[21] Under the

model act, a board and care home may request a hearing to challenge the initial imposition of a civil penalty. Following an unfavorable decision at the first hearing, the home may request a second hearing to challenge the agency's determination of the length of time violations in the home remained uncorrected. Legislation can provide that issues surrounding the existence of the violations resolved during the first hearing cannot be relitigated during the second hearing. This provision expedites the second hearing because it forecloses reconsideration of whether the violation in fact existed.[22]

1. *See e.g.*, Conn. Gen. Stat. Ann. § 19-603 (West 1977); Hawaii Rev. Stat. §§ 321-15.6, 346-92 (Supp. 1981); Ill. Ann. Stat. ch. 111½, § 4153-802 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. § 16-10-4-5 (Burns Supp. 1982); Mich. Comp. Laws Ann. § 400.710 (West Supp. 1982); Minn. Stat. Ann. § 245.802 (West Supp. 1982-1983).
2. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Laws, the Rulemaking Process,* 60 Iowa L. Rev. 731, 737 (1975).
3. *Id.*
4. *Id.*
5. Revised Model State Administrative Procedure Act (National Conference of Commissioners on Uniform State Laws 1961). *E.g.*, Ark. Stat. Ann. §§ 5-701 to 5-714 (Supp. 1981); Conn. Gen. Stat. Ann. §§ 4-166 to 4-189 (West Supp. 1982); Hawaii Rev. Stat. tit. 8 §§ 91-1 to 91-18 (1976 & Supp. 1980); Idaho Code §§ 67-5201 to 67-5218 (1980 & Supp. 1983); Mich. Comp. Laws Ann. §§ 24.201 to 24.315 (West Supp. 1982-1983); Nev. Rev. Stat. §§ 223B.010 to 223B.160 (1981); N.C. Gen. Stat. §§ 150A-1 to 150A-64 (Supp. 1981); Okla Stat. Ann. tit. 75, §§ 301 to 326 (1976 & West Supp. 1982-1983); Wash. Rev. Code Ann. §§ 34.04.010 to 34.04.940 (West Supp. 1983-1984); Wis. Stat. Ann. §§ 227.01 to 227.26 (West 1982).
6. *E.g.*, Ind. Code Ann. §§ 4-22-1-1 to 4-22-2-12 (Burns Supp. 1980); Minn. Stat. Ann. §§ 14.01 to 14.70 (West Supp. 1983); Or. Rev. Stat. §§ 183.025 to 183-725 (1981); S.C. Code Ann. §§ 1-23-10 to 1-23-400 (Law. Co-op Supp. 1982).
7. *E.g.*, Ky. Rev. Stat. § 13.085 (1980) & Utah Code Ann. § 63-46-5 (Supp. 1983) provide for uniform notice and comment rulemaking procedures only.
8. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform,* 58 Or. L. Rev. 411, 449 (1980).
9. Administrative Conference of the U.S., Recommendation No. 69-8, 1 C.F.R. § 305.69-8 (1983).
10. Similar provisions appear in Ill. Ann. Stat. ch. 111½, § 4153-203 (Smith-Hurd Supp. 1982-1983); Minn. Stat. Ann. § 245.802; Mont. Code Ann. § 53-20-305(3)(b) (1981).
11. *See infra* section 16 & Comment.
12. Model APA adjudication provisions also can be triggered by constitutional requirements or a provision in the model APA that specified licensing actions are subject to its adjudication procedures. *See, e.g.* Wash. Rev. Code. Ann. § 34.04.010(3) (Supp. 1983-1984).
13. One commentator has noted that the mandates of an administrative procedure act should be limited to fundamental concepts and minimum general standards and should preserve the flexibility and capacity of all state agencies to perform their lawful functions properly and adequately. Bonfield, *supra* note 2, at 738. The major purpose of the state licensing agency is to ensure the receipt of high quality care by residents of board and care homes. The modifications noted in the following discussion enable the agency to better serve its purpose.
14. 5 U.S.C. § 554(c) (1982).
15. Model State Administrative Procedure Act § 4-205 (National Conference of Commissioners on Uniform State Laws 1981).
16. *See, e.g.*, Ind. Code Ann. § 4-22-1-4 (Burns 1982); Mich. Comp. Laws Ann. § 24.278(2) (1981); Wash. Rev. Code Ann. § 34.04.090(4) (Supp. 1983-1984).
17. *United States v. City of Jackson, Mississippi,* 519 F.2d 1147, 1151 (5th Cir. 1975).
18. *Id.*
19. *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 616 F.2d 1006, 1014 (7th Cir. 1980).
    The legislative history accompanying the federal Administrative Procedure Act consent agreement provision states;
    > There is much more reason [for informal settlement of cases] in the administrative process [than the judicial], for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process. . . . .

    Staff of Senate Comm. on the Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248 at 24, 79th Cong., 2d Sess. 1945.
    A consent agreement involves a waiver of the right to fully litigate an issue. *U.S. v. Armour & Co.*, 402 U.S. 673, 681-682 (1971). The waiver must be clearly made, with full knowledge of the rights waived. 28 Am Jur. 2d Estoppel & Waiver § 158 (1966). Moreover, the conditions upon which the waiver is granted must be fully stated in the agreement. *Armour*, 402 U.S. at 681-682.
20. *See, e.g.*, Conn. Gen. Stat. Ann. § 19-608 (West Supp. 1982); Ill. Ann. Stat. ch. 111½ §§ 4153-704 to 713 (Smith-Hurd Supp. 1982-1983); Wis. Stat. Ann. §§ 50.03(5), 50.03(11) & 50.04(4) (West Supp. 1983).
21. *See infra*, section 25 & comment.
22. Although *res judicata* has traditionally been applied in the courts, recent developments indicate its applicability to administrative determinations. In 1966, the U.S. Supreme Court ruled that courts can apply *res judicata* to a disputed issue of fact resolved by an agency acting in a judicial capacity before which the parties had an opportunity to litigate. *U.S. v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). The second *Restatement of Judgments* provides that, with certain stated exceptions, a valid and final adjudicatory determination by an administrative tribunal has the same effects under the rules of *res judicata,* subject to the same exceptions as a judgment of a court. *Restatement (Second) of Judgments* § 83 (1982).

SECTION 7. STATE LICENSING TO SUPERSEDE LOCAL REGULATION.

This Act and the regulations promulgated pursuant to this Act shall supersede any program of any political subdivision of the state which licenses or sets standards for board and care homes.

COMMENT

In areas of general or statewide concern, state legislation may provide that it will supersede local regulation of a specified field.[1] The model act adopts this approach, thereby precluding licensing of board and care homes by political subdivisions of the state.

The state's authority to exercise exclusive jurisdiction over regulation of a particular area is limited in states in which the constitutions contain a home rule provision. The goal of the home rule provision is to limit state intervention into traditionally local concerns. In these states, courts are inclined to hold that state legislative acts

are invalid when they deal with municipal or local affairs and are in conflict with municipal ordinances, charters, or rules.[2] However, in areas of general or statewide concern, the state's authority supersedes that of local governments. While there is no explicit rule to determine whether an area is of general concern, a number of factors have been considered by state courts.[3] They include: (1) whether the state law will be applied with uniformity throughout the state; (2) whether the state law applies to all persons, places, or things within a classification; and (3) whether the issue addressed by the law is of principal concern to the general or statewide community, rather than to the people of one or all home rule cities.[4] Under these tests, board and care home licensing should be considered an area of general or statewide concern. The model act applies uniformly throughout the state and applies to all homes in the state that fall within the definition contained in the model act. Moreover, the regulation of residential facilities serving elderly and disabled persons has traditionally been an interest of the entire state rather than of particular localities.

Some state board and care licensing laws authorize operation of local licensing programs that impose requirements greater than the state standards.[5] The model act rejects this approach because the existence of additional licensing standards could result in board and care homes developing an institutionalized environment or closing due to an inability to finance the cost of compliance with the additional, more stringent standards.[6]

Moreover, supersedence of local licensing programs is necessary to the effective operation of the model act's zoning provision. In home rule states, zoning can be considered an area of local concern. By providing for one system of comprehensive statewide licensing, the act clarifies that board and care home regulation is an area of statewide concern. Once this is done, zoning of board and care homes also becomes an area of statewide concern. In this way, the state legislature justifies its override of local zoning laws.

The existence of local licensing programs also could threaten the act's goal of encouraging the location of board and care homes in residential areas. A locality that does not want a board and care home to locate in a particular residential area can achieve the same result as exclusionary zoning by denying the home's application for a license.

1. 3 C. Antieau, *Municipal Corporation Law*, § 24.08 (1983 & Supp. 1983); 9 E. McQuillan, *Municipal Corporations* § 26.23a (1978 & Supp. 1982); *Stewart v. County of San Mateo*, 54 Cal. Rptr. 599, 604 (Ct. App. 1967).
2. 1 C. Antieau, *supra* note 1, at § 3.17.
3. *Id.* at § 3.20.
4. *Id.*
5. E. McQuillan, *supra* note 1. *See, e.g.*, Ohio Rev. Code Ann. § 3721.09 (Page 1980); Ill. Stat. Ann. Ch. 111½, §§ 4153-104 to 106 (Smith-Hurd Supp. 1982-1983).
6. Occasionally, a court refuses to allow a local government to complement state controls when it feels additional regulations would be in conflict with state policy. 1 C. Antieau, *supra* note 1 at § 5.39.

SECTION 8. BOARD AND CARE PLAN.

COMMENT

The model act provides for the development of a board and care plan for each resident of a board and care home. Two important functions of the plan are identified in the definition.[1] First, the plan describes the ability of the resident to function in a board and care home including that resident's strengths and weaknesses. This description of the resident's functional capabilities is based upon assessments completed prior to and as part of the development of the plan.[2]

Second, the plan is a mechanism for coordinating the delivery of services to the resident, often referred to as case management.[3] It describes in what areas a resident needs and requests personal assistance, supervision, supportive services, lodging, and meals. Hopefully, the plan will serve as a map to guide the home in ensuring that the resident receives the appropriate services. As in any human endeavor, planning helps to improve efficiency and quality.

The need for service coordination to residents of board and care homes and the utility of individualized plans as a mechanism for service coordination for elderly, developmentally disabled, and mentally ill persons living in the community have been recognized by commentators, and in case law, statutes, and regulations. In hearings before the U. S. Senate Special Committee on Aging, experts identified inadequate or nonexistent case management services as a barrier to the receipt of community mental health services.[4] A subsequent report of the General Accounting Office which examined the same issues also identified case management as an essential element in delivery of mental health services to elderly persons.[5]

Investigations of board and care homes serving mentally ill and developmentally disabled as well as elderly persons have revealed that needed services are not being delivered.[6] The movement of large numbers of persons into board and care homes is a result of the deinstitutionalization of large facilities in order to return patients to their communities.[7] The conclusion reached by one commentator is that the lack of a coordinated service delivery system is chief among the problems which have isolated these residents in their community settings and have resulted in further mental and physical deterioration.[8]

Court decisions, consent agreements, and the threat of litigation have played a major role in the deinstitutionalization of hospitals for mentally ill and developmentally disabled persons[9] and have continued to influence the provision of care to those deinstitutionalized patients living in the community.[10] Much of a consent agreement in *Caswell v. Secretary*[11] is devoted to setting out the procedure for placing patients in the community and providing case management services to them.[12] Three of the components of a successful program for placing residents in the community are identified in the agreement: (1) assessment of the needs of residents;

(2) coordination of agencies who provide services to the resident; and (3) delivery of services in the community and a system for monitoring delivery of those services.[13] In *Caswell,* the development of an individualized treatment plan was relied upon to guide the delivery of services to the former patients living in the community.[14]

Finally, a number of federal statutes and regulations require case management systems and the implementation of those systems through development of individualized plans as a condition for receipt of federal funds by states.[15] The regulations to the Keys Amendment to the Social Security Act, which apply to board and care homes, require that each state establish standards governing the policies for admission into board and care homes including a continuous needs assessment and referral to appropriate resources.[16] The model act relies on the board and care plan as the mechanism for assessing the needs of the residents and coordinating services to meet those needs in compliance with federal regulations.

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1. The design for the board and care plan draws heavily upon a recent federal study, Rehabilitation Services Administration, *Design Specifications for Case Management/Service Coordination and Individualized Planning* (Rehab Group, Inc., Falls Church, Va. 1980) [hereinafter *Design Specifications*]. Although the above project analyzed case management systems and individual habilitation plans for developmentally disabled persons, the basic principles derived from the project are applicable to other service coordination systems and assessment plans.

   The above project advocates a two step planning process similar to the steps incorporated in the model act's board and care plan:

   > The first stage is the General Service Component which addresses the client's needs and states goals and general objectives for meeting those needs. The second stage in the planning process is the Individual Program Component, which is geared toward specific behavioral and measurable objectives for meeting the needs of the client.

   Id. at vii-viii.

2. *See infra* section 8.2.

3. In *Design Specifications, supra* note 1, the project defines case management and distinguishes it from the preferred term, service coordination.

   > Through the conceptualization process, case management became defined as a mechanism for (1) providing a specialized assistance, to each individual desiring and needing such assistance, in selecting and obtaining resources and services, and (2) coordinating the delivery of services to meet each individual's needs. Such assistance is provided to the degree and for the duration of time requested and required by the individual with a focus on developing the individual's capability to negotiate and obtain needed and appropriate services on his/her own behalf. The major thrust of case management is service coordination.

   Id. 1-2.

   Throughout *Design Specifications,* the project used the phrase "service coordination" in lieu of "case management" for three reasons: (1) to emphasize that the process centers around the individual who requests the services and not a "case" which needs management; (2) to more accurately describe the actual process, i.e., coordination of services; and (3) to avoid the use of a term such as case management which, because it is widely used, has a distinct connotation for professionals in a number of different disciplines.

   Id. at 2-1 to 2-2.

   The model act also uses the phrase service coordination rather than case management for these reasons.

4. *Aging and Mental Health: Overcoming Barriers to Service: Hearing Before the Special Comm. on Aging of the Senate,* 96th Cong., 2d Sess. (Part 2) (May 22, 1980) (statements of Jack Weinberg, M.D., Prof. of Psych., Rush Med. Center, Admin., Ill. M.H. Inst.; Wm. R. Hutton, Exec. Dir., Nat'l Council of Sen. Cit.; Paul A. Kerschner, Ph.D., Assoc. Dir. Nat'l Ret. Teacher's Ass'n & American Ass'n of Retired Persons; Arthur S. Flemming, Ph.D., Chm., U.S. Comm'n on Civil Rights; Robert C. Benedict, Comm'r Admin. on Aging, Office of Human Dev. Servs. [hereinafter cited as *Aging and Mental Health Hearings*].

5. General Accounting Office, *The Elderly Remain in Need of Mental Health Services,* (HRD-82-112 Sept. 16, 1982) [hereinafter cited as *The Elderly Remain in Need*].

   > Professional case management ensures that elderly patients with multiple chronic health and psychosocial problems receive all medical, psychiatric and social services necessary to maintain or improve their physical and mental condition.

   Id at 15.

6. Comptroller General's Report to the Congress, *Identifying Boarding Homes Housing the Needy Aged, Blind, and Disabled: A Major Step Toward Resolving a National Problem* 8 (General Accounting Office HRD 80-17 Nov. 19, 1979). In a survey conducted as part of the foregoing report, 74 percent of the residents interviewed said they did not receive any social services. *Id.* at 15.

   A number of other federal studies have identified the lack of an effective service delivery system as a major problem in board and care homes. J. Teresi, M. Holmes, & D. Holmes, *Sheltered Living Environments for the Elderly* (Community Research Applications, Inc. 1982); N. Dittmar, G. Smith, J. Bell, C. Jones, & D. Manzanares, *Board and Care For Elderly and Mentally Disabled Populations* (Denver Research Institute 1983); C. Harmon, *Board and Care: An Old Problem, A New Resource for Long Term Care* (Center for the Study of Social Policy, Washington, D.C. June 30, 1982); S. Sherwood, V. Mor, & C. Gutkin, *Domiciliary Care Clients and the Facilities in Which They Reside* (Hebrew Rehabilitation Center for Aged, Boston 1981); K. Reichstein & L. Bergofsky, *Summary and Report of the National Survey of State Administered Domiciliary Care Programs in the Fifty States and the District of Columbia* (Horizon House Institute, Phila., Pa. 1980).

7. Budson, *Sheltered Housing for the Mentally Ill: An Overview,* 4 McLean Hosp. J. 140 (1979). The author identifies the use of psychotropic drugs, litigation, and federal statutes as the three major forces underlying the deinstitutionalization movement. *Id.* at 141-43.

8. North Carolina Neuropsychiatric Ass'n Task Force, *The Care of the Mentally Ill in Rest Homes* (Oct. 1982). The recommendations made by the above task force include the following:

   > There should be a comprehensive care plan developed for each patient including a plan for care in the home and in the community, and this should be completed prior to placement in a home.
   >
   > Psychosocial rehabilitation services must be provided within each community and be made available to all patients. This should include a comprehensive range of activities to meet multiple levels of needs and include recreational and socialization activities, social skills training, occupational and work programs, and opportunities for progression out of Rest Homes into less restrictive and more independent living arrangements.

   Id. at 7.

9. *See, e.g., Wyatt v. Stickney,* 325 F. Supp. 781 (N.D. Ala. 1971); 344 F. Supp. 387 (N.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *Halderman v Pennhurst,* 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part & rev'd in part,* 612 F.2d 84 (3d Cir. 1979), *rev'd* 451 U.S. 1 (1981).

10. *Dixon v. Weinberger,* 405 F. Supp. 974 (D.D.C. 1975) (which recognized that the defendant hospital had a responsibility for a former patient discharged into the community pursuant to a continuing plan of treatment).
11. *Caswell v. Secretary, Dep't of Health & Human Services,* No. 77-0488-CV-W-8 (W.D. Mo. February 8, 1983).
12. *Id.*
13. *Id.* at 7-8.
14. *Id.* at 42-43.
15. *See, e.g.,* The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001, (1976 & Supp. v 1981) (requiring an individualized habilitation plan to be developed for each individual receiving services pursuant to state programs funded under the act); The Mental Health Systems Act, 42 U.S.C. 9501(1)(b) (Supp. v (1981) (recommends that each individual receiving mental services have a right to an individualized, written, treatment or service plan). Programs for the Aged, 42 U.S.C. § 3026 (Supp. v 1981) (requires that each area agency develop a plan which includes elements of service coordination such as outreach, information, and referral).
16. 45 C.F.R. § 1397.20(a)(i) (1982).

Section 8.1. Requirements.

(A) The board and care plan shall describe in lay terms the following:

(1) the resident's specific strengths and limitations in performing daily living activities;

(2) any medical or health problems of the resident which are relevant to the services needed by the resident;

(3) any physical disabilities or impairments of the resident which are relevant to the services needed by the resident;

(4) any emotional or mental health problems of the resident which are relevant to the services needed by the resident;

(5) any other problems of the resident which are relevant to the services needed by the resident.

(B) The plan shall describe the needs of the resident for personal assistance by identifying the specific daily living activities with which the resident needs assistance and by stating the other types of personal assistance which are needed by the resident.

(C) The plan shall state the needs of the resident for supportive services by identifying the specific types of supportive services as provided in section 2.5.

(D) The plan shall identify the name, address, and telephone number of the provider of each supportive service which is described in the plan.

(E) The plan shall be in writing and shall be written in language that can be easily understood by a lay person.

(F) The board and care plan shall be signed by the resident and the service coordinator.

(G) A copy of the board and care plan shall be given to the resident.

COMMENT

The mechanism for coordinating services for each resident is the individualized board and care plan. Upon completion, the plan should describe clearly the resident and the services to be provided to the resident in a manner that will guide the staff of the home in assisting the resident. Note that although this section and sections in Section 8 use the word resident to refer to the person for whom the board and care plan is being prepared, this person may not yet be a resident of a home.

Involvement of the resident is essential to the development of the plan. The resident's right to self-determination is respected by requiring that the resident sign the plan. If a resident has been determined to be incapacitated under state law to enter into an agreement such as a board and care plan and a guardian has been appointed, the guardian would help prepare the plan and would sign the plan on behalf of the resident.

Individualized program plans have become the primary tool for evaluating, delivering services, and measuring the progress of an individual in the service delivery system.[1] At least four federal laws require individualized program planning.[2] Since most of these laws require that states implement individualized planning in order to qualify for federal funds, most state service delivery systems also use individualized plans. The Standards for Services for Developmentally Disabled Individuals developed by the Joint Commission on Accreditation of Hospitals also requires the use of individual program plans.[3]

Several common elements have been identified in federally legislated individualized plans:

- a separate written plan for each client;
- a statement of the client's needs;
- stated goals or objectives to meet the individual's needs;
- services to be provided or strategies which will be employed to meet the goals and objectives;
- a stated initiation date for services and the anticipated duration of such services;
- evaluation procedures or criteria for determining if the client's needs are being met; and
- a specified period for review.[4]

Many of the above elements involve setting a future goal and measuring the individual's progress toward that goal. In other words, if an individual's behavior does not improve during the specified period for review, the program should be adjusted to increase the opportunity for meeting the defined goal.

Although the board and care plan contains some of the above seven (7) elements, it does not require setting goals and measuring the individual's progress toward those goals. The main purpose of the plan is to ensure that the

individual receives the services that he or she requires while living in the board and care home. However, other service providers may develop individualized plans, apart from the board and care plan, which do set goals to be met by that individual. For example, a person with chronic mental illness might be discharged from a state hospital and placed in a board and care home. The board and care plan would require that outpatient mental health services be provided to that individual as a supportive service. If those services are provided at a community mental health center (CMHC), the CMHC may develop an individualized treatment plan for that individual. The treatment plan developed would set goals for that individual, such as living independently in his or her own apartment. The individual's progress toward that goal would then be measured at intervals throughout the planning process. If there are common elements in the board and care plan and CMHC's treatment plan, there might be an attempt to integrate those two plans.

1. Rehabilitation Services Administration, *Design Specifications for Case Management/Service Coordination and Individualized Planning* 4-1 (Rehab Group, Inc., Falls Church, Va. 1980).
2. Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C.§ 6011 (Supp. v 1981); Education of All Handicapped Children Act, 20 U.S.C.§ 1401 (1982); Rehabilitation Act of 1973 as amended, 29 U.S.C. § 722 (1982); Supplemental Security Income, Disabled Children's Program, 42 U.S.C. § 1382(d) (1982).
3. Joint Comm'n on Accreditation of Hospitals, *Standards for Services for Developmentaly Disabled Individuals* 11 (Chicago 1977).
4. *Design Specifications, supra* note 1, at 4-5 to 4-6.

Section 8.2. Preparation.

(A) The board and care plan shall be prepared by the service coordinator, the resident, and, at the resident's request, the resident's attorney, advocate, family member, or person designated by the resident to assist with the plan.

(B) The description of the functional abilities of the resident as provided in section 8.1 shall be prepared from evaluations, records, and all other information from past and current service providers of the resident. If the service coordinator determines that there is insufficient data from which to describe the functional abilities of the resident, the coordinator shall obtain, with the consent of the resident, further evaluation(s) in the area(s) in which data are required, taking into account any evaluation requirements for the individual under state or federal law.

(C) In preparing the board and care plan, the service coordinator must contact the following persons to obtain the evaluations, records, and other information as provided in subsection (B) about the functional abilities of the resident, the services which have been provided to the resident currently or within the past three (3) years, and the services which may be available to the resident currently or in the future:

(1) all agencies, persons, or organizations currently providing services to the individual or who have provided services to the resident within the past three (3) years;

(2) all agencies, persons, or organizations which have evaluated, examined medically, or assessed the needs of the resident within the past three (3) years;

(3) the administrator of any licensed home if the resident presently resides in a board and care home; and

(4) any other persons, organizations, or agencies with information that may be important to the preparation of the plan.

COMMENT

Under the model act, the board and care plan is prepared primarily by the service coordinator and the resident. One alternative to this approach is to designate a team of persons who would have primary responsibility for preparation of the plan. One model provides for preparation of individualized habilitation plans by a team composed of the resident, the resident's parent or guardian, the resident's advocate, the service coordinator, and the representative(s) of agencies which have provided services in the past, which are providing services in the present, which may provide services in the future, or which have conducted diagnostic assessments of the individual.[1]

Although the model act does not require a service coordination team to prepare the plan, subsection (C) does require that the service coordinator contact past and present service providers, the administrator of the home, and other persons, such as family members, who may have information which is important to the preparation of the plan. In this way, the information and viewpoints of the persons who might otherwise have direct involvement in preparation of the plan will at least be involved indirectly through the service coordinator.

Subsection (B) requires that, to the extent possible, the service coordinator should rely on evaluations and data from past and current service providers. The method for obtaining these evaluations and other data is through contact by the coordinator with all agencies, organizations, and persons who have provided services within three (3) years. Additional evaluations of the individual should only be undertaken, with the consent of the resident, after a determination that the information available is insufficient.

The importance of assessing an individual's needs by means of comprehensive multidisciplinary evaluations has been recognized.[2] Particularly with regard to persons who are mentally ill or developmentally disabled, comprehensive evaluations may already have been performed or may be performed in the future through the existing service delivery systems.[3] Comprehensive evaluations of

elderly persons are less likely to be available,[4] and additional assessments may be required prior to the development of the board and care plan.

1. Rehabilitation Services Administration, *Design Specifications for Case Management/Service Coordination and Individualized Planning* 3.10 (Rehab Group, Inc., Falls Church, Va. 1980).

2. D. Braddock, *Opening Closed Doors: The Deinstitutionalization of Disabled Individuals* (1977), in which the author states that:

> The first step in the process is to identify the needs of each individual resident in the institution (or region, state, etc.). This procedure—termed global assessment—is ongoing. It involves determining behaviorally specific physical and mental abilities in such skill areas as independent living, social interaction, quantitative skills, communication skills and especially self-help skills in hygiene, eating, dressing and ambulation. This information may possibly be obtained from data already available in a recent observation or developmental assessment of the resident. When this information is unavailable, which is more often the case than not, the deinstitutionalization process breaks down and cannot sensibly proceed until such psychosocial information about the resident has been obtained.

Id. at 82.

See also General Accounting Office, *The Elderly Remain in Need of Mental Health Services* 13 (HRD 82-112 Sept. 16, 1982) which states that one of the "essential elements of a basic program for community mental health services for the elderly" is psychogeriatric assessments. The report went on to state:

> It is widely agreed that comprehensive assessment and development of treatment plans are important. Trained psychogeriatric screening teams should assess the medical, psychological, and social needs of patients, determine the appropriate supportive environment and develop a treatment plan . . . .
>
> There was consensus among professionals we talked to that psychogeriatric assessment, including differential diagnosis (to distinguish medical from emotional causes of symptoms), is important and should be available to all elderly patients with mental symptoms.

Id.

3. State programs receiving federal funds under the Developmentally Disabled Assistance and Bill of Rights Act are required to perform a comprehensive evaluation on each individual prior to the preparation of a habilitation plan and the delivery of services. 42 U.S.C. § 6001 *et seq.* Similarly, evaluations of persons with mental health diagnoses are performed either in a hospital environment or through a community mental health center.

4. *Aging and Mental Health: Overcoming Barriers to Service: Hearings Before the Special Comm. on Aging of the Senate,* 96th Cong., 2d Sess. (Part 2) (May 22, 1980) (testimony of Jack Weinberg).

Section 8.3. Information to be Given to the Resident.

Prior to development of a board and care plan, the service coordinator shall explain to the resident the following:

(A) the process for development of the board and care plan;

(B) the reasons for development of the board and care plan;

(C) the resident's role as decisionmaker in development of the board and care plan;

(D) the resident's right to consent or to refuse to consent to preparation of a board and care plan and the effect of the resident's refusal to consent;

(E) how to contact the service coordinator;

(F) the resident's right to request a change in the service coordinator if the resident reasonably believes the relationship between the resident and the coordinator is ineffective in meeting the resident's needs; and

(G) eligibility criteria including financial eligibility criteria and a written statement of any fees or charges to the resident in preparation of the board and care plan.

COMMENT

A resident cannot consent to the preparation of a board and care plan unless he or she receives all information necessary to enable the resident to give his or her informed consent. Section 8.3 sets out affirmatively the information regarding a board and care plan which must be explained to a resident prior to obtaining his or her consent to preparation of the plan. The list of information required to be given to the resident is adapted from a guideline set out in a recent federal study which proposes a model for preparation of an individualized plan.[1]

1. *Supra* section 8.2, note 1.

Section 8.4. Service Coordinator.

(A) The agency shall designate a person to serve as service coordinator for each resident. The service coordinator may be either an employee of the agency or may be a person outside of the agency who has contact with the resident by reason of other services which are provided to the resident or who has acted or is acting in the capacity of a service coordinator; [except that the service coordinator shall not be the employee or agent of a person, agency, or organization currently providing supportive services to the resident.]

(B) Each person acting as a service coordinator shall have the following minimum qualifications:

(1) an understanding and familiarity with the problems of the special disability group, if any, to which the resident belongs;

(2) a knowledge of the services which are available to meet the resident's particular needs;

(3) the capability of analyzing evaluation and assessment data to determine the needs of the resident;

[(4) a license, degree, or certification that the person

is qualified as a social worker, or professional in another related field, or is a graduate of a specialized training program.]

(C) The agency shall change the service coordinator upon the request of either the resident or the coordinator if the request is based upon the reasonable belief that the relationship between the resident and the service coordinator is ineffective in meeting the needs of the resident.

COMMENT

Since the service coordinator will have primary responsibility for preparation of the board and care plan, it is essential that the coordinator be well-qualified and have a productive working relationship with the resident. For these reasons, subsections (A) and (B) set out criteria and qualifications for selecting a service coordinator; subsection (C) provides a mechanism for permitting the resident to request a change in the service coordinator.

Under the act, the service coordinator may not be necessarily an employee of the agency which has overall responsibility for board and care plans under the act. For example, the agency may have a contractual relationship with the Area Agency on Aging (AAA) which would permit the agency to refer elderly persons to that office.[1] Persons in the AAA office might be well-qualified to act as service coordinators for elderly persons not only because of their understanding of the problems of elderly persons but also because of their knowledge of the services available in the community.

The only prohibition against delegation by the agency of the function of service coordination is that it cannot be performed by an agency, individual, or organization which is providing services to the resident. The reason for this prohibition is the potential conflict of interest that could arise if a single provider is delegated the role of preparing a plan for meeting all of the resident's needs and coordinating all of the services required to meet those needs. Further, the resident may be reluctant to question his or her need for a service if the provider of that service is preparing the plan. However, this language has been bracketed in order to give each state the option of deleting this prohibition.

The minimum qualifications for a service coordinator set out in paragraphs (1) through (3) emphasize the substantive requirements that are needed to be a qualified service coordinator. Individuals with a number of different backgrounds such as social workers, psychologists, or well-trained non-professionals could meet these substantive requirements. An optional requirement, paragraph (4), is added in brackets to permit states to require that the person also has a degree or specialized training to further qualify him or her to be a service coordinator.

Finally, section 8.4 also sets out in subsection (C) a mechanism for permitting an agency to change service coordinators for a resident. This subsection is adapted from a guideline in a recent federal project which developed a model for preparation of individualized plans.[2] Since the service coordinator is the person primarily responsible for working with the resident in preparing the plan, this section safeguards against the possibility of an unproductive working relationship between the two individuals by requiring the agency to designate another coordinator.

1. Most states have Area Agencies on Aging on the local level in order to meet the requirements for federal funds under the Older Americans Act, 42 U.S.C. § 3025 (1981).

2. *Supra* section 8.2, note 1.

Section 8.5. Placement.

(A) After preparation of the initial board and care plan, the service coordinator will explore placement alternatives available to the individual. The decision on placement shall be made only with the consent of the resident and after consideration of the following factors:

(1) the availability in the surrounding community of supportive services needed by the resident and accessibility to those services;

(2) the least restrictive alternative appropriate to meet the needs of the resident;

(3) placement in an area in which the resident has family or friends; and

(4) placement in a home which can provide personal assistance required by the resident and in which the house rules and lifestyle are compatible with the resident and the resident's needs.

(B) If the resident is residing presently in a board and care home at the time the plan is prepared, the resident may remain in that home if the resident wishes and the home consents to the resident remaining there regardless of consideration of the factors provided in paragraphs (1)-(4) of subsection (A).

(C) After placement of the resident has been made, a copy of the board and care plan should be provided to the home, and a follow-up conference involving the resident, the administrator of the home, and the service coordinator shall take place at the facility.

(D) Adjustments in the plan shall be made with the consent of the resident if such adjustments are required.

COMMENT

The model act envisions that many residents will be placed or referred to board and care homes by an agency providing services to that individual. For example, many mentally ill persons are referred to board and care homes at the time they are discharged from psychiatric treatment in a state or private hospital.[1]

Placement has been defined as "fitting potential residents to facilities that will best meet their needs."[2] Ideally, placement of a resident should occur after preparation of a board and care plan so that the needs of the resident identified in developing the plan can be con-

sidered in deciding what home can meet those needs most appropriately. In furtherance of this ideal, this section sets out several factors in paragraphs (1) through (4) of subsection (A) which the resident and the agency must consider prior to the final placement decision.

Despite the fact that it may be preferable for the decision on placement to occur after preparation of the plan, there are at least three situations in which the resident may be residing in a board and care home prior to preparation of a plan. First, on the effective date of the act, residents of board and care homes will have to have an initial plan prepared for them or have a physician's certification as provided in section 9.2. Second, section 9.1 leaves open the possibility that persons may be self-referred and subsequently admitted to a home before preparation of a plan. Third, section 8.6 provides for an annual review of the plan for each resident of a board and care home. In order to defer to the preferences of each resident, subsection (B) provides that the resident may remain in the home where he or she is residing presently if the resident prefers to remain there.

The importance of appropriate placement of a resident in a board and care home should be emphasized. In addition to the problems of inadequate case management services, inappropriate placements in board and care homes or the placement of a resident in a home far removed from available services are cited often as obstacles to improving the plight of board and care residents.[3] Although the federal regulations promulgated pursuant to the Keys Amendment require states to develop standards for admissions into board and care homes,[4] few state licensing statutes contain admission policies or procedures.[5]

Appropriate placement of a resident in a home can be made only after a resident's needs have been determined and the services which will meet those needs have been identified.[6] To the extent that placement of a resident in a board and care home is the provision of a residential service, it is only logical that the appropriate service is considered in conjunction with other services which will be provided to the individual.[7]

As discussed in previous sections, the board and care plan is offered as a tool for effective service coordination as well as appropriate placement. The copy of the plan which is given to the administrator of the home as provided in this section is to be used in delivering personal assistance to the resident. If unanticipated circumstances arise after placement, this section also provides for adjustments to the plan with the consent of the resident. This fine tuning of the plan can be accomplished at the followup conference with the resident, the service coordinator, and the administrator.

1. S. Segal & U. Aviram, *The Mentally Ill in Community-Based Sheltered Care* (1978), which identified state and community mental hospitals as two of the major agencies involved in placing mentally disabled persons in shelter care in California. *Id.* at 92.
2. *Id.* at 79.
3. *See Aging and Mental Health: Overcoming Barriers to Service: Hearings Before the Special Comm. on Aging of the Senate,* 96th Cong., 2d Sess. (Part 2) 65-66 (May 22, 1980). (Statement of Arthur S. Flemming, Chm. U.S. Comm'n on Civil Rights, in which Dr. Flemming identifies inappropriate placement of elderly persons in residential facilities as one barrier to the delivery of mental health services to those persons.)
4. 45 C.F.R. § 1397.20(a)(1)(i) (1982).
5. Commission on Legal Problems of the Elderly, American Bar Association, *Board and Care Report,* at 219 n.23 (1984)and accompanying text which states that only 26 of the 112 statutes analyzed had any admission, placement or case management provisions.
6. Developing an individualized plan and then placing an individual into a service which is consistent with that plan is also the model used under the federal Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.* (1982) and the regulations promulgated under the statute.
7. B. Sales, D. Powell, & R. Van Duizend, *Disabled Persons and the Law* 429 (1982), which treats placement of an individual into a residential facility as the provision of a residential service for purposes of the model act on the Right to Services.

Section 8.6. Periodic Review.

(A) The service coordinator shall meet once every three (3) months with the resident and the administrator of the home in order to review the plan. The service coordinator shall confer privately with the resident prior to meeting.

(B) The service coordinator and the resident shall prepare a new plan annually following the procedures set out in sections 8.1-8.6.

COMMENT

The model act provides for two levels of periodic review of the board and care plan. First, the plan is reviewed by the service coordinator, the resident, and the administrator of the home. This quarterly review process not only permits the coordinator to monitor whether services are being provided to the resident but also allows the coordinator to resolve any problems that could arise between a resident and the administrator. The requirement that the service coordinator must confer with the resident prior to the meeting provided for in subsection (A) is intended to give the resident the opportunity to discuss issues that he or she may not wish to discuss in the presence of the administrator of the home.

Second, the act requires that a new plan be prepared annually pursuant to the requirements set out in sections 8.1-8.6. If drastic changes have not occurred in the needs of the resident, the new plan will probably be based largely on the plan for the previous year. However, requiring the resident and the service coordinator to go through the steps for initial preparation of a plan ensures that new information from providers and others about the needs of the resident will not be ignored. If changes have occurred in the needs of the resident, these changes can be reflected in the plan by adding or subtracting services from the plan in accordance with the needs and requests of the resident.

SECTION 9. ADMISSIONS.

Section 9.1. Admissions.

(A) Except as provided in subsection (B), each resident shall have either a board and care plan or physician's certification on file at the board and care home:

(1) prior to admission to a board and care home, or

(2) if a resident is admitted to the home without a board and care plan or physician's certification, within forty-five (45) days after admission.

(B) Each individual who is a resident of a board and care home as of the effective date of this Act shall have a board and care plan or physician's certification within one hundred and eighty (180) days of the effective date of this Act. The agency shall assist homes and residents in complying with this subsection.

COMMENT

One finding which reoccurs throughout federal studies of board and care homes is that the needs of residents for services both in the home and the community are not being met. As discussed earlier, the board and care plan was included in the model act as an assessment tool to match the needs of the residents with the services which are available in the home and the community. To some residents, however, preparation of the board and care plan may represent an unwelcomed intrusion upon their privacy. In order to protect the autonomy of a resident while still guarding against inappropriate placement of residents in board and care homes, the act permits a resident to choose between preparation of a board and care plan or obtaining a physician's certification as provided in section 9.2.

Although preparation of a board and care plan prior to admission is encouraged under the act, this section also permits preparation of a plan or certification within forty-five (45) days of admission by order to address situations in which the resident is self-referred and admitted without enough time to prepare the plan in advance of admission. Subsection (B) sets out the time, one hundred and eighty (180) days, within which each resident must have a plan or certification after the effective date of the act.

Section 9.2. Physician's Certification.

A physician's certification shall state the following:

(A) the resident does not need care provided by the board and care home which is greater than personal assistance;

(B) a description of the functional abilities of the resident including his or her specific strengths and limitations; and

(C) the specific needs of the individual for personal assistance.

COMMENT

The primary purpose of the physician's certification is to ensure that the resident's needs can be appropriately met by placement in a board and care home. The requirement that a physician certify that the resident does not need a level of care greater than personal assistance is intended to satisfy that primary purpose. The concept of a physician's certification is based upon provisions in a number of state statutes which require that a physician certify that the individual is appropriate for placement in a board and care home.[1]

The certification of the physician must also describe the individual's need for personal assistance. In other words, if the individual has an arthritic condition, the certification would describe which movements are restricted by the arthritis and the daily living activities, such as dressing or bathing, for which assistance is needed because of the arthritis. In this way, the physician's certification can provide some guidance to the operator as to what the specific needs of the resident are for personal assistance.

1. *See, e.g.*, Or. Rev. Stat. § 443.445 (1981); Fla. Stat. Ann. § 400.426 (West 1981); N.C. Gen. Stat. § 131D-2(e) (1981 & Supp. 1982).

Section 9.3. Responsibilities of Licensee.

The home shall be responsible for informing residents and persons seeking admission to a board and care home of the requirement of a board and care plan or a physician's certification as provided in section 9.1.

COMMENT

It is expected that some individuals may seek admission to a board and care home without referral through a placement agency. The individual may know of the home because it is in his or her neighborhood and may approach the licensee about whether a room is available. Although the act encourages placement of an individual after preparation of a board and care plan so that the needs of the residents can be matched with the services available in the home and community, it is not intended to exclude persons who are not referred to the home by an agency. However, to ensure that the resident receives appropriate services in the home and in the community the model act requires the home to inform the resident or persons seeking admission about the requirement for either a board and care plan or physician's certification.

Section 9.4. Admission Agreements.

(A) Prior to admission to a board and care home or no later than forty-five (45) days after admission, the

home and the resident shall enter into an admission agreement. The agreement shall be in writing, shall be signed by both parties, and shall include the following:

(1) the resident's board and care plan or physician's certification attached to the agreement and incorporated by reference;

(2) the agreement of the home to provide personal assistance, lodging, and meals as provided in the board and care plan or physician's certification;

(3) the charges, expenses, and other assessments for personal assistance, lodging, and meals and the method of payment by the resident;

(4) the agreement of the resident to make payment of the charges, expenses, and other assessments in accord with the method of payment specified in the admission agreement;

(5) the names, addresses, and telephone numbers of the resident's next of kin and, if applicable, the person designated as the responsible party to be notified in the event of an emergency or transfer of the resident; and

(6) the house rules as provided in section 10.15.

(B) The agency shall provide a standard form for an admission agreement which may be used in preparation of the agreement by the home or resident.

(C) The home shall give one copy of the agreement signed by the resident and the home to the resident, and one copy to the agency. The home shall keep the original in the resident's records.

COMMENT

This section requires the resident and home to enter into an agreement setting out their respective rights and responsibilities with regard to the admission of the resident into the home. It is anticipated that the requirement of a written admission agreement will minimize any confusion regarding each party's respective rights and obligations. In order to reduce the potential burden on the home and resident of preparation of these agreements, the agency is required to provide a standard form which may be used for the agreement.

Section 9.5. Termination of Admission Agreements.

(A) No board and care home shall terminate the admission agreement of any resident of the home except for the following reasons:

(1) behavior of the resident which poses an imminent danger to such resident or any other persons in the home;

(2) failure of the resident to make payment of the charges, expenses, and other assessments in accord with the method of payment as specified in the admission agreement; except that, if the failure to make payments is related to an interruption of the resident's receipt of possible benefits to which the resident is entitled, the home shall retain the resident without payment pending resolution of the action which resulted in the interruption of the benefit payments unless the home assists the resident in obtaining such benefits or any other supplemental benefits in the period prior to discharge of the resident;

(3) repeated behavior of the resident which directly impairs the well-being, care, or safety of the resident or any other resident or which substantially interferes with the orderly operation of the home;

(4) the home has had its license revoked, not renewed, or has voluntarily surrendered its license;

(5) upon transfer of the resident by the agency as provided in section 27; or

(6) the resident has been removed from the home, for medical treatment or care, to a hospital, nursing home, or residential health care or treatment facility; except that the home may not discharge the resident under this subsection if the resident has paid the charges, expenses, and assessments due to the home during the period in which he or she has been removed from the home.

(B) No board and care home may terminate the admission agreement of any resident for one of the grounds stated in section (A) until the following requirements have been met:

(1) the home gives at least thirty (30) days written notice, on a form prescribed by the agency, to the resident, the resident's next of kin, and the person designated in the admission agreement as the responsible party, if any, that the resident's admission agreement will be terminated;

(2) such notice contains the reason for the termination of the admission agreement and a statement that the resident has a right to object to the termination of the resident's admission agreement;

(3) the home furnishes to the resident a list of free legal services within the home's geographical area and a list of other available community resources which provide resident advocacy services. The agency shall provide the list to all licensed board and care homes.

(C) Nothing in this section shall prohibit:

(1) the removal of a resident from a home, for medical treatment or care, to a hospital, nursing home, or residential health care facility; or

(2) the removal from a home of a resident whose behavior poses an imminent danger to that resi-

dent or any person, by a peace officer, acting pursuant to his special duties, or a police officer, who is a member of an authorized police department or force or a sheriff's department; or

(3) the removal from a home of a resident whose behavior poses an imminent danger to a location which ensures the resident's safety, pursuant to regulations of the agency.

(D) Removal of a resident as provided in section 9.5(C) shall not be deemed to be a termination of the admission agreement. In order to terminate the admission agreement of a resident removed from the home as provided in section 9.4(C) the home must proceed to terminate the admission agreement pursuant to sections 9.4-9.5; except that in addition to the requirements stated in sections 9.4-9.5, the written notice required to be given to the resident by section 9.4(B) shall be personally delivered to the resident at the location to which he or she has been removed. If personal delivery is not possible, then such notice shall be served upon the resident by any method permitted by the rules of civil procedure.

(E) Upon termination of an admission agreement the agency shall assist the resident in relocating to another home or community placement as provided in section 9.8.

COMMENT

This section, based upon a provision in a New York statute,[1] sets out the grounds upon which the home may terminate the admission agreement. The section also states the requirements for notifying the resident, the agency, and others if the home does seek to involuntarily terminate an agreement. The purpose of this section is to protect the rights of the residents and the home by clearly stating the grounds upon which the home may involuntarily terminate an agreement. However, nothing stated in these sections would prohibit the voluntary termination of an agreement by the home and the resident.

Although this section sets out procedures which must be followed in order for the home to terminate the admission agreement, this section permits immediate removal of a resident in certain emergencies. Subsection (D) emphasizes that emergency removal of a resident does not relieve a home from complying with the procedural requirements for termination of an admission agreement after emergency removal has been accomplished.

1. N.Y. Soc. Serv. Law § 461-c to 461-g (McKinney Supp. 1981-1982).

Section 9.6. Special Proceedings for Termination of an Admission Agreement.

The proceeding to terminate the admission agreement of a resident of a board and care home shall be brought in a court of competent jurisdiction in accordance with the rules of civil procedure.

COMMENT

Although the New York statute[1] upon which sections 9.3-9.5 are based provides for special forum and special proceeding requirements if a home wishes to terminate an admission agreement and involuntarily discharge a resident, the model act merely provides that the proceedings shall be brought in state court pursuant to the rules of civil procedure. A state enacting the model statute may wish to provide for special expedited proceedings for termination of admission agreements similar to the proceeding in the New York statute.

States adopting the model act should substitute the name of the court which will have jurisdiction to hear these proceedings for the reference in the act to the court of competent jurisdiction. One alternative would be to delegate to the agency the responsibility for conducting these special proceedings in accordance with the state's administrative procedures act.

1. N.Y. Soc. Serv. Law § 431-g (McKinney Supp. 1981-1982).

Section 9.7. Availability of Other Rights and Remedies to Enforce Agreement.

Notwithstanding the provisions of sections 9.4-9.6, the parties to the admission agreement shall have the rights and remedies available to them under state law to enforce that agreement.

COMMENT

Although the act sets out special requirements and procedures to which the home must adhere in order to involuntarily terminate an admissions agreement, section 9.7 clarifies that the act does not intend to exclude the parties from bringing other actions to enforce the admission agreement. For example, a resident might wish to bring an action against the home to enforce the home's agreement to provide personal assistance as specified in the board and care plan if the home is providing too much or too little personal assistance. Or, the home may wish to recover expenses owed to it by the resident without necessarily discharging the resident from the home. Section 9.7 clarifies that all remedies under state law are available to both parties to enforce the agreement.

SECTION 10. RESIDENT RIGHTS.

Section 10.1. Resident Records.

(A) Each home shall keep a record of the following information for each resident:

(1) the resident's name;

(2) the resident's last address;

(3) the name of the person or agency referring the resident to the home;

(4) the name, specialty (if any), telephone number, and emergency telephone number of each physician who has treated the resident during the preceding twelve (12) months;

(5) the date the resident began residing in the home;

(6) a copy of the resident's current board and care plan or certification by a physician;

(7) a list of medications taken by the resident including the dosage;

(8) written acknowledgements that the resident has received copies of the rights as provided in section 10.12, and the house rules if such rules have been developed pursuant to section 10.15;

(9) a record of all personal property and funds which the resident has entrusted to the home, including copies of receipts of the property referred to in section 10.4;

(10) information about any specific health problems of the resident which may be useful in a medical emergency;

(11) the name, address, and telephone number of a person identified by the resident who should be contacted in the event of an emergency or death of the resident;

(12) any other health-related, emergency, or pertinent information which the resident requests the home to keep on record;

(13) the current admission agreement between the resident and the home.

(B) The agency shall assist small and medium homes in complying with the requirements of subsection (A). The agency shall provide forms to these homes upon which the information required by subsection (A) can be recorded.

(C) Each resident shall have the right subject to state and federal law, at reasonable times, or during ordinary business hours to inspect and copy (or have a copy provided for him or her by the home) any or all of the records referred to in subsection (A) of this section and any records used in the development of the board and care plan as provided in section 8. The home may charge the resident the cost of copies made pursuant to this section.

(D) The home or agency shall not disclose the name of any resident except as may be necessary, or disclose any resident's records to any person or agency other than the personnel of the home or the agency for their exclusive use except upon express written consent of the resident or court order unless the disclosure is required by state or federal law.

(E) No inspection or investigative report or written complaint which is accessible to the public shall disclose the identity of a resident of a board and care home.

COMMENT

In order to ensure that each home maintains adequate and current records, this subsection lists items which a home must maintain in the file of each resident.[1] Accurate and complete records of each resident must be maintained in order to ensure the quality and continuity of care provided to each resident.[2] Since the compilation of records could burden financially small and medium board and care homes, this section also provides that the agency shall assist these homes in complying with the section, which assistance includes providing forms to the home and other methods of assistance.

One state statute requires that a home maintain records of any complaint regarding a resident.[3] This requirement was not included in the model act for two reasons. First, specific information regarding any behavioral problems of the resident which may affect his or her life at the home will be discussed in the board and care plan. Second, it is difficult to fairly and accurately describe a complaint made against a resident, which may have been made by another resident, without prejudicial effect upon that resident.

Some statutes regulating nursing homes and other community residential facilities provide that the confidentiality of resident records will be maintained but designate certain individuals such as agency personnel, the attorney general, and appropriate law enforcement agency personnel who may have access to the records without court order or the consent of the resident.[4] The model act limits access to the records of the residents to the home and the agency for their exclusive use. Others are permitted access to the records only with the written consent of the resident or court order unless otherwise permitted by state and federal law. It is anticipated that if access to resident records is required by enforcement personnel outside of the state licensing agency that access can be obtained through the consent of the resident after informing the resident of the need for the records, or by order of a court. By limiting access of others to the records of residents it is intended that the resident's right to control access to those records be maximized to the greatest extent possible.

1. Gordon & Lazarus, *New Jersey's Rooming and Boarding House Act: Its Effects and Effectiveness,* 12 Seton Hall L. Rev. 484 (1982).
2. *Halderman v. Pennhurst,* 446 F. Supp. 1295, 1306 (E.D. Pa. 1977) which states that "Adequate record keeping is essential for proper habilitation of the residents. Without such records, the staff will not know what the individual is already able to do, what type of care he or she should be receiving, and how to evaluate progress made by the individual."
3. D.C. Code Ann. § 6-1972 (1981).
4. Mo. Ann. Stat. § 198.032(1) (Vernon Supp. 1982).

Section 10.2. Privacy.

(A) Each resident's privacy shall be respected in every aspect of daily living, including but not limited to

the following:

(1) in any medical examination or health-related consultations the resident may have at the home;

(2) during visits with other persons;

(3) in oral communications, in writing, or by telephone;

(4) in the resident's room or the resident's portion of the room. The staff of the home may not enter a resident's room without first requesting the permission of the resident to enter his or her room, except when a condition presents an imminent danger, or as required by the resident's board and care plan;

(5) in the conduct of the resident's personal affairs unless otherwise provided for in the resident's board and care plan;

(6) visual privacy in tub, shower, and toilet rooms; and

(7) in intimate personal hygiene.

(B) Spouses shall be permitted but not required to share a room where both are residents of the home. The wishes of residents who are not spouses to share a room shall be strongly considered in making room assignments.

(C) Each resident shall be permitted to have guests or other residents in his or her room.

(D) Each resident shall be permitted to close the door of his or her room at any time including during visits with guests or other residents in his or her room.

(E) In the event that a resident expresses the wish for privacy in a particular daily living activity, the home shall take all reasonable steps to comply with the wishes of the resident.

COMMENT

The right to privacy has been recognized as an important right which must be protected if a resident is to maintain his or her autonomy in a communal setting.[1] The model act has stated the right to privacy in a board and care home in general terms, in addition to using specific examples, in order to emphasize that the resident's right to privacy should be respected by the home in every phase of the resident's life. It is the intent of the model act to provide board and care home residents with the same protections of their privacy as if they were private-pay boarders in a rooming house, subject only to limitations which may be required by the board and care plan.

1. *Wyatt v. Stickney,* 344 F. Supp. 373, 379 (N.D. Ala. 1972) (which requires that a state hospital respect the right of privacy of involuntarily committed mentally ill patients).

Section 10.3. Humane Care and Environment. Dignity and Respect.

(A) Each resident shall have the right to humane care and a humane environment, including but not limited to the following:

(1) the right to a diet which is consistent with any religious or health-related restrictions;

(2) the right to refuse a restricted diet;

(3) the right to a safe and sanitary living environment.

(B) Each resident shall have the right to be treated with dignity and respect, including but not limited to:

(1) the right to be treated in a courteous manner by staff; and

(2) the right to receive a response from the home to any request of the resident within a reasonable time.

COMMENT

The rights to humane care and environment and treatment with dignity and respect are legal terms of art which originated, in part, in court decisions recognizing the rights of involuntarily committed mentally ill patients.[1] Humane care, environment, dignity, and respect are general concepts intended to govern the provision of care in all aspects of daily living in a board and care home. The rights to a nutritious diet, safe and sanitary living environment, courteous treatment by staff, and reasonable responses to resident requests are only four examples of ways in which these general concepts are to be implemented.

The rights listed under subsection (A) duplicate, to some extent, the facility requirements set out in sections 12.1-12.7. These dietary and environmental requirements are reiterated in this section both as examples of a resident's right to humane care and environment and to emphasize the importance of these requirements. In addition, a resident's right to refuse a restricted diet accords a right which may not be covered by the facility requirements, such as the right of a resident to refuse a low-calorie diet imposed on him or her by the home.

1. *Wyatt v. Stickney,* 344 F. Supp. 387 (N.D. Ala. 1972).

Section 10.4. Personal Possessions.

(A) Each resident shall have the right:

(1) to wear his or her own clothing;

(2) to determine his or her own dress, hair style, or other personal effects according to individual preference;

(3) to retain and use his or her own personal property in the resident's own living area so as to maintain individuality and personal dignity.

(B) Each resident shall have a separate storage area in his or her own living area and at least one locked cabinet or drawer for keeping personal property.

(C) Each home shall provide a place and written procedures for safekeeping of valuable personal possessions of each resident. A copy of these written procedures shall be given to a resident at the time of his or her admission. If the home has adopted house rules as provided in section 10.15, these written procedures may be included in the house rules of the home. Each resident shall have the option of permitting the home to hold valuable personal possessions in trust according to the written procedures of the home. The home shall give the resident a receipt listing each of the items which it is holding in trust for the resident. A copy of the receipt shall be placed in the records of the residents as described in section 10.1.

(D) The agency shall assist small and medium homes in complying with this section including but not limited to assistance in developing procedures and the provision of forms or receipts.

COMMENT

Subsection (A) of this section is based upon a similar provision in the resident rights section of the New Jersey Room and Boarding House Act.[1] The language of the enumerated rights in section 10.4 not only recognizes the right to use and exercise control over one's personal possessions but also recognizes the rights to self-expression and to establish an identity which is separate from others. The right to use one's own personal clothing and possessions enhances a resident's ability to maintain his or her autonomy while living in a communal residence such as a board and care home.

Since a board and care home is a communal living situation in which both residents and staff may wander in and out of the resident's living area from time to time, it is essential that each resident be provided with a locked storage area for safekeeping of personal possessions.[2] While the locked storage area need not be large enough to store all of the resident's personal possessions, it should have sufficient space for storing items, such as a wallet or medication, which a resident needs on a daily basis but which should be kept safe from others.

Finally, each home is required to provide written procedures for safekeeping of a resident's valuable possessions and papers. If a home has developed house rules pursuant to section 10.15, the home may incorporate these written procedures into their house rules if it is expedient to do so. A board and care home may be a permanent residence for individuals who have no other option for safekeeping of their possessions and papers. The option of entrusting them to the home must be provided to each resident. Since the facilities of each home may differ, subsection (C) only provides that a home must set up a procedure by which the resident may entrust valuables to the home and obtain access to those valuables. If valuables cannot be safely kept on the premises of the home, a safety deposit box at a nearby bank might be obtained. Since small and medium homes may have trouble complying with these sections, assistance by the agency is required.

An ombudsman program familiar with the problems of board and care homes has observed that in some instances, board and care operators or staff may appropriate residents' personal possessions for their own use.[3] Requiring the home to give the resident a receipt listing the valuables entrusted to it as provided in subsection (C) is designed to prevent loss of a resident's possessions.[4]

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1. N.J. Stat. Ann. § 55:13B-19 (West Supp. 1982).
2. *See* Okla. Stat. tit. 63, § 1-1918(7) (Supp. 1981-1982) and Mich. Comp. Laws Ann. § 330.1728(2) (Supp. 1982) for examples of other statutory language which require that residents be provided with a locked storage compartment.
3. *See* M. McClave, *Personal Care Homes: Nowhere Else To Go!* 18 (rev. Oct. 1982) (unpublished report by Long Term Care Ombudsman Program of Metropolitan Atlanta, Ga.) which states:

   > Residents may also lose their private funds and personal possessions to the operator when they move into a home. Operators can talk these vulnerable people into handing their resources over to them or they may be stolen by other residents or staff.

   Id. at 18.
4. A similar provision is contained in D.C. Code Ann. § 6-1965(d) (1981) which requires the facility administrator to maintain receipts of the personal property of each resident.

Section 10.5. Resident Funds.

(A) Each resident shall have the right to manage his or her personal funds unless the rights of the resident are otherwise restricted by state or federal law.

(B) The home shall at the time of admission provide each resident with a written statement explaining the resident's rights regarding personal funds and listing the services regarding the safekeeping and management of funds for which the resident will be charged. The home shall obtain a signed acknowledgement from each resident that the resident has received this statement. A copy of this acknowledgement shall be placed in the resident's records as provided in section 10.1.

(C) If the resident wishes to entrust funds to the home to protect the resident's funds, the home:

(1) may accept funds from a resident for safekeeping and managing, if the home receives written authorization from the resident. The authorization shall be attested to be a witness who has no pecuniary interest in the home or its operations, and who is not connected to the home in any manner whatsoever;

(2) shall maintain and allow each resident access to a written record of all financial arrangements and transactions involving the individual resident's funds;

(3) shall provide each resident with a written itemized statement, at least quarterly, of all financial transactions involving the resident's funds;

(4) shall purchase a surety bond to guarantee the security of residents' funds and the security of any personal property entrusted to the home pursuant to this section; the agency shall promulgate regulations setting the amount of the surety bond;

(5) shall keep any funds received from a resident for safekeeping in an account separate from all other funds of the home;

(6) shall deposit any funds received from a resident in excess of $100 in an interest-bearing account insured by agencies of, or corporations chartered by, the state or federal government. The account shall be in a form which clearly indicates that the home has only a fiduciary interest in the funds and any interest from the account shall accrue to the resident. The home may keep up to $100 of a resident's money in a non-interest-bearing account or petty cash fund, to be readily available for the resident's current expenditures. Upon written request of the resident, the home may increase the amount of that resident's money in a non-interest-bearing account or petty cash fund, up to $200;

(7) shall return to the resident upon written request, all or any part of the resident's funds given to the home for safekeeping, including the interest accrued from deposits;

(8) shall place any monthly allowance to which a resident is entitled in that resident's personal account, or give it to the resident, unless the home has written authorization from the resident to handle it differently;

(9) unless otherwise provided by state law, upon the death of a resident, shall provide the executor or administrator of the resident's estate with a complete accounting of all the resident's funds and personal propety, including any funds and personal property of the resident being held by the home;

(10) if the home is sold, shall provide the buyer with a written verification by a public accountant of all residents' monies and properties being transferred, and obtain a signed receipt from the new owner.

(D) Small and medium homes which are unable to comply with subsection (B) because of the financial burden compliance would impose on the home may apply to the agency for a variance from compliance with subsection (B) as provided in the following procedures:

(1) as a condition to receiving a variance, the home must agree to cooperate with the agency by any alternative means of compliance developed by the agency;

(2) if a home applies for a variance under this section, the agency shall develop an alternative procedure to protect resident funds entrusted to the home;

(3) if no satisfactory alternative procedure can be developed, the home will not be permitted to accept funds from the resident pursuant to this section;

(4) a variance of this section shall not be granted until the home and the agency have agreed to an alternative procedure to meet the requirements of this section, or the home and the agency have agreed that the home shall not accept resident funds pursuant to this section. The variance shall state the conditions upon which the variance has been granted; and

(5) the agency shall prepare a written summary of the alternative procedures or a statement that the home may not accept funds from the residents. A copy of the summary or statement shall be distributed to the residents by the home as provided in subsection (B).

COMMENT

Each resident has the right to manage his or her own financial resources, unless that right is restricted by state law, by a guardianship for example, or by federal law, such as the designation of a representative payee for some recipients of Supplemental Security Income.[1] In the event that the resident wishes to delegate some of this responsibility to the home, subsection (B) of section 10.5 provides detailed procedures and requirements for the protection of a resident's funds.[2] The intent of this section is to permit the resident to entrust funds to a home while at the same time safeguarding those funds.

Evidence indicates that large numbers of residents may be signing their Supplemental Security Income checks over to boarding home operators.[3] Personal assistance with a resident's financial resources is one service which a board and care home may be required to provide. If homes will be managing the financial resources of residents, the safeguards provided for in section 10.5 of the model act are required not only for protection of the resident, but also for protection of the administrator.

Admittedly, the requirements of section 10.5 could impose a financial burden upon a small home. For this reason, a licensee of a small home or a medium home may apply for a variance from the requirements of this section. A variance may not permit a home to avoid totally the requirements of this section. An alternative method for compliance must be agreed upon by the home and the agency or the home may not accept resident funds in trust.

1. Subsection (A) of this section is based on the first sentence of Ky. Rev. Stat. § 216.515(8) (1982).

2. Subsection (B) of this section is based on Ill. Ann. Stat. ch. 111½, § 4152-201(1) (Smith-Hurd Supp. 1982-1983).

3. Comptroller General's Report to the Congress, *Identifying Boarding Homes Housing the Needy Aged, Blind, and Disabled: A Major Step Toward Resolving a National Problem* 15 (General Accounting Office HRD 80-17 Nov. 19, 1979).

Section 10.6. Social Interaction and Communication.

Each resident shall have the right to interact freely with others both within the home and in the community including but not limited to the following:

(A) the right to receive and send unopened correspondence and to be provided with pen, paper, envelopes, and stamps at the resident's own expense if the resident is unable to obtain them for himself or herself;

(B) the right to access to a telephone for outgoing and incoming calls, to a private telephone at the resident's own expense, and to privacy in telephone conversations;

(C) the right to unrestricted communication including personal visits with any person of the resident's choice and to have each visitor of the resident treated with courtesy and respect;

(D) the right to make contacts with the community and to achieve the highest level of independence, autonomy, and interaction with the community of which the resident is capable;

(E) the right to leave and return freely to the home unless specifically restricted by the board and care plan;

(F) the right to private visits with the resident's lawyer, doctor, advocate, or guardian.

COMMENT

The right of a resident to social interaction without restriction is a right which separates the resident of a board and care home from the resident of an institution, because it recognizes the resident's freedom to control his or her own movements and relationships in and out of the home. In addition, there is some indication that the rights to social interaction, particularly the right of the resident to visits with others, may be frequently abused. Some homes may prohibit the resident from exercising the right to visit with others or may merely discourage the right by being rude and offensive to visitors of the resident.[1] As with other statements of residents' rights, the model act states the resident's right to social interaction both in general and specific language because of the importance of the right and its susceptibility to abuse.

The model act places few restrictions on the resident's right to socially interact with others. It may be that in practice the right of individual residents are so unfettered that they begin to intrude on the rights of other residents and on the rights of the staff of the home. For example, a resident's unrestricted right to make telephone calls at odd hours of the night might be unfair to other residents if the telephone is located near sleeping areas. One alternative provided in the model act is for the home to adopt house rules pursuant to section 10.15 which internally regulate the interaction of the residents and others so that the exercise of the rights of some residents do not infringe on the enjoyment of those rights by others.

1. The largest percentage of complaints received by the Florida Ombudsman Program regarding the rights of board and care home residents were in the areas of privacy and freedom of association and communication. Office of Program Development, Administration on Aging, *Executive Summary; The Long-Term Care Ombudsman Program; National Summary of State Ombudsman Reports for FY 1981.* 35 (Oct. 1982).

An ombudsman program in Georgia has found that, "Some home operators inhibit people from visiting by being unfriendly to visitors, setting unreasonable visitation rules or threatening to discharge a resident." M. McClave, *Personal Care Homes: Nowhere Else to Go!* 17 (rev. Oct. 1982) (unpublished report by the Long Term Care Ombudsman Program of Metropolitan Atlanta, Ga.).

Section 10.7. Access by Advocates and Community Organizations.

A board and care home shall permit advocates, members of community organizations, and representatives of community legal services programs, whose purposes include rendering assistance without charge to board and care home residents, to have access to the home at reasonable times in order to:

(A) visit, talk with, and make personal, social, and legal services available to all residents;

(B) inform residents of their rights and entitlements, and their corresponding obligations under state, federal, and local laws by distribution of educational materials and discussion in groups and with individuals;

(C) assist residents in asserting their legal rights regarding claims for public assistance, medical assistance, and Social Security benefits, as well as in all other matters in which residents are aggrieved, which may be provided individually, or in a group basis, and may include organizational activity, counseling, and litigation; and

(D) engage in all other methods of assisting, advising, and representing residents so as to extend to them the full enjoyment of their rights.

COMMENT

This section is based upon a provision from a regulation governing health care facilities in the District of Columbia[1] and it sets out in detail the activities which are included in the right of access. The purpose of this section is to permit advocates or local community organizations to come into the home to visit with residents, inform them of particular rights, or to counsel them on special problems. For example, a community legal services group might come into the home to discuss with residents their rights to receive Supplemental Security Income.

This section differs from the right to social interaction and communication described in section 10.6 in that the advocates who request access under this section may not have been invited to come into the home by a resident or group of residents. It is important for community groups and advocates to have the right to enter the home in order to educate and inform residents of their rights even if these groups were not invited by a particular resident or group of residents.

As defined in section 3, the term advocate includes any group which acts as a public representative for any individual or group of individuals, and includes the state protection and advocacy agency, local citizen advocacy groups, the state or local long-term care ombudsman, or other recognized advocacy groups. Since the names and compositions of such groups may differ from state to state, the model act uses the term "advocate" in lieu of listing each group which must be given access. Similarly, the phrase community organizations is intended to include all religious and social groups which may wish to support the home through visits, gifts, and food at holidays or other opportunities for involvement of the residents in the community.

Advocates, community groups, and legal services groups cannot effectively advocate on behalf of the residents of board and care homes unless they are given access to those homes.[2] Evidence indicates that nursing home ombudsmen are being denied access to board and care homes.[3] The model act's detailed provision authorizing access to homes is intended to remedy this type of problem and to encourage the involvement of advocates on behalf of board and care home residents.

1. D.C. Mun. Regs. tit. III, § 3
2. Legal Services Corporation, *Nursing Home Law; A Legal Services Practice Manual* 48-9 (1982).
3. M. McClave, *Personal Care Homes: Nowhere Else To Go!* 21 (rev. Oct. 1982) (unpublished report by the Long Term Care Ombudsman Program of Metropolitan Atlanta, Ga.), which identified access to home by advocates as one of three major problems common to board and care homes:

> The Ombudsman Program and other agencies are denied admittance to some of the worst personal care homes and therefore cannot reach and serve potential clients. Ombudsman have the statutory authority to enter and tour personal care homes but are sometimes stopped at the door by the operator and often, even when allowed to enter, are denied a thorough tour and private conversation with residents.

Section 10.8. Employment.

Each resident shall have the right to refuse to perform services for the home except as contracted for by the resident and the operator or as provided in the board and care plan. If the resident is hired by the home to perform services as an employee of the home, the wage paid to the resident shall be consistent with state and federal law.

COMMENT

This section, based on a provision in New Jersey's Rooming and Boarding House Act,[1] prohibits the resident from being forced to work for the home unless he or she agrees to perform the work on a contractual basis or consents to perform work such as household duties as part of the board and care plan. One federal study of board and care homes notes that a majority of residents of homes are being asked to perform chores, usually dusting and cleaning, in the home.[2] The intent of this section is to give a resident the right to refuse work for the home, while at the same time permitting such resident to agree to perform services that may be financially or personally rewarding.

The model act does not require that the wage paid to a resident employed by a home be consistent with the minimum wage rates for several reasons. First, the Fair Labor Standards Act (FLSA),[3] the federal law which sets minimum wage rates for employees covered by the FLSA, is not applicable to state owned and operated homes under the act.[4] Second, the sections of FLSA regulating the wage requirements for handicapped workers were undergoing change at the time the model act was being drafted.

As defined in the model act, non-state owned and operated board and care home would fall within the definitions of "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce" under the FLSA so that wages paid to resident employees would be governed by the FLSA.[5] Special provision is made under the FLSA for handicapped workers which permits the Department of Labor to issue regulations providing for "[e]mployment under special certificates of individuals. . . whose earning or production capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage[.]"[6] Regulations have been promulgated to implement certain provisions of these sections of the FLSA. These regulations permit the agency which administers vocational rehabilitation services in each state to apply for special certificates under the act for individual handicapped workers.[7] Other regulations governing when reduced wages can be paid to a handicapped worker and under what circumstances a handicapped worker could be compensated at less than the minimum wage rate may be promulgated in the future.

Finally, in addition to the complexities of federal law, many states have their own versions of the Fair Labor Standards Act.[8] The blanket requirement of minimum wage rates for residents employed by homes under the model act would risk confusing, rather than clarifying, the interrelationship of the state and federal laws. For these reasons, the model act chooses only to require that the home pay its resident employees wages which are consistent with federal and state law.

1. N.J. Stat. Ann. § 55:13B-19M (West Supp. 1982).
2. Comptroller General's Report to the Congress, *Identifying Boarding Homes Housing the Needy Aged, Blind, and Disabled: A Major*

Step Toward Resolving a National Problem 15 (General Accounting Office HRD 80-17, Nov. 19, 1979).

3. 29 U.S.C. §§ 201 *et seq.* (1976 & Supp. 1981).
4. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (which held that the 1974 amendments to FLSA which made that act applicable to employees of states and their political subdivisions exceeded the authority of Congress under the Commerce Clause).
5. *Marshall v. Sunshine and Leisure, Inc.* 496 F. Supp. 354, 357 (M.D. Fla. 1980) (which held that employees of adult congregate living facilities in Florida are covered by the FLSA); *Donovan v. New Floridian Hotel*, 676 F.2d 468 (11th Cir. 1982).
6. 29 U.S.C. § 214(c)(1) (1976 & Supp. 1981).
7. 29 C.F.R. §§ 524.1 *et seq.* (1983) (which implement 29. U.S.C. §*214*(c)(2) and (3)). Additional regulations provide for special wage rates for handicapped workers employed in sheltered workshops. 29 C.F.R. §§ 525. *et seq.* (1983).
8. *See, e.g.*, Ohio Rev. Code Chapter 4111 *et seq.* (Page 1980).

Section 10.9. Freedom of Religion.

The resident shall have the right to practice the religion of his or her choice or to abstain from religious practice. Residents shall also be free from the imposition of the religious practices of others.

COMMENT

Section 10.9 of the model act is based upon resident rights provisions in several states.[1] Although the right of every citizen of the United States to practice the religion of his or her choice is clearly protected by the First Amendment to the U. S. Constitution, section 10.9 of the model act underscores that this right is applicable to a resident of a board and care home.

1. *See, e.g.*, N.J. Stat. Ann. § 30:6D-4(b) (West Supp. 1981); N.J. Stat. Ann. § 55:13B-19(n) (West 1981); N.C. Gen. Stat. § 131D-21(15) (1981 & Supp. 1982); and Ga. Code *8* 31-8-111 (1982).

Section 10.10. Control and Receipt of Health-Related Services.

Each resident shall have the right to control his or her receipt of health-related services including but not limited to the following:

(A) the right to retain the services of his or her own personal physician and dentist. Each resident shall have the right to confidentiality and privacy concerning his or her medical or dental condition and treatment;

(B) the right to select the pharmacy or pharmacist of the resident's choice. Each resident shall have the right to administer his or her own pharmaceuticals unless specifically provided otherwise in the resident's board and care plan.

COMMENT

Although a board and care home does not provide medical, nursing, or other health-related services to the residents, many residents may have a need for health care services. Section 10.10 is included in the model act to protect the autonomy of the resident in the receipt of these health-related services.

In addition to the right to select his or her own doctor or dentist, this section would also protect the resident's right to choose where to receive emergency hospital treatment. Notwithstanding, if a resident has been determined to be incompetent to decide health-related questions, a guardian or other substitute-decisionmaker would make those decisions on the resident's behalf.

Section 10.11. Prohibitions Against Abuse, Neglect, and Restraints.

(A) The home shall take reasonable actions to insure that residents are not physically, sexually, or otherwise abused.

(B) The home shall not neglect the needs of the residents as specified in the board and care plan or physician's certification.

(C) Physical restraints shall not be used on a resident by the staff of a board and care home, except when a resident's actions present an imminent danger to himself or herself, or others, and only until appropriate action can be taken by medical, emergency, or police personnel. It is the responsibility of the home to seek assistance immediately.

(D) Chemical restraints shall not be used on a resident by the staff of a board and care home, except that this section shall not prohibit a resident from voluntarily taking tranquilizers or other medication which is prescribed by a licensed physician.

COMMENT

Abuse and neglect of board and care residents are ongoing problems.[1] Section 10.11 of the model act prohibits abuse and neglect of residents while, at the same time, offering the home limited authority to control a violent resident in an emergency. Note that the standard for when a home may intervene with physical restraints is the same imminent danger standard used throughout the act.

The act charges the home with the responsibility to take reasonable steps to see that residents are not abused by others. However, it is not intended that the home insure against abuse which could not be reasonably prevented.

In addition to prohibitions against abuse and neglect contained in most resident rights statutes, many states have separate abuse reporting statutes. These laws require the mandatory reporting by professionals of suspected abuse or neglect of elderly persons or disabled adults.[2] Although the model act does not define abuse, abuse is defined in a Florida statute as:

> ...treatment under which an individual suffering from infirmities of aging is deprived or allowed to be deprived, of food, clothing, shelter or medical treatment essential to his well-being, or is

> permitted or is likely to cause, the adult's physical or emotional health to be significantly impaired.[3]

By not defining "abuse," the model act is relying on the meaning of the word as it is commonly defined as "to hurt by treating badly," "mistreat," "to use insulting, coarse, or bad language about or to; scold harshly; revile," or "injury."[4] The purpose of using this broad definition of abuse is to give the agency or court broad discretion to decide if abuse had occurred based on the facts of each case. A state, if it preferred, could follow Florida's example and specifically define abuse.

Note that under subsection (D) the staff of the home is prohibited from using chemical restraints on a resident. Since the staff of board and care homes will not include a licensed physician it is unlikely that an occasion would arise in which the staff could prescribe and administer chemical restraints to a resident. Recognizing that some residents may be taking major tranquilizers regularly, this section does not prohibit a resident from voluntarily taking that medication.

1. *Abuse of the Elderly*, Human Services Monograph Series (Project Share 1981); *see also* M. McClave, *Personal Care Homes: Nowhere Else to Go!* 17 (rev. Oct. 1982) (unpublished report by the Long Term Care Ombudsman Program of Metropolitan Atlanta, Ga.(which reports instances of neglect, abuse, and use of restraints with board and care residents.

   > Personal care home residents also have little or no protection from caretakers who are unfamiliar with the care of mental patients and, as a result, abuse them verbally and/or physically. Physical abuse, isolation and excessive retraints may also be practiced in some homes.

2. Ill. Ann. Stat. ch. 111½, § 4164 *et seq.* (Smith-Hurd Supp. 1982); Ohio Rev. Code Ann. § 5101.61 *et seq.* (Page 1982). For a discussion of mandatory reporting of abuse statutes *see* Center for Research and Advanced Study, *Improving Protective Services for Older Americans Legal Role* (September, 1982).
3. Fla. Stat. Ann § 410.11(3) (West Supp. 1982).
4. Webster's New World Dictionary, 2d College Edition, at 6 (1980).

Section 10.12. Notice of Rights.

(A) The agency shall give each home licensed under this Act a copy of all the resident rights enumerated in this section and the names, addresses, and telephone numbers of the advocates who are available to assist the resident in understanding and enforcing these rights.

(B) The home shall be responsible for making copies of such rights and distributing them to each resident.

(C) If a resident is unable to read the list of rights, the rights shall be read to the resident in a language the resident understands. The licensee or administrator shall explain to the resident any portions of the rights which the resident does not understand and shall answer any questions the resident may have regarding the rights.

(D) After a copy of the rights has been given or read to the resident, the resident shall sign and date a written acknowledgement that the resident has read or has been read the rights, that the resident understands the rights, and that any questions which the resident has regarding the rights have been answered by the home. A copy of the written acknowledgement signed and dated by the resident shall be placed in the resident's records as provided in section 10.1.

(E) A copy of the list of resident rights shall be conspicuously posted in the home at all times.

(F) The home shall ensure that the staff is familiar with and observes the rights and responsibilities enumerated in this Act.

(G) Any policy, procedure, or rule of the home which is inconsistent with or contrary to a right enumerated in this Act shall be null and void.

COMMENT

Some statutes require the home to prepare a list of resident rights or a summary of such rights.[1] In order to ensure uniformity and to relieve homes of the burden of preparing a summary, the responsibility for preparation of a list of the rights has been given to the state agency.

Notification to a resident of his or her rights is an essential element of resident rights provisions since a resident cannot take steps to protect or enforce rights of which he or she has no knowledge. Most statutes have resident rights provisions which require a facility to notify residents of their rights either by giving each resident a copy,[2] or by posting a copy[3]; both are rarely required.[4] To ensure that each resident receives actual notice of his or her rights as a resident of a board and care home, this section requires not only that the home notify the resident of his or her rights and post a copy of the rights but also requires that the home take steps to reasonably assure that the resident understands those rights.[5]

1. *See, e.g.*, Ga. Code Ann. § 31-8-104 (1982) (which provides instructions for the preparation of the notice of rights); Ill. Ann. Stat. ch. 111½, § 4152-211 (Smith-Hurd Supp. 1982-83) (which provides that a summary of the rights shall be given to each resident).
2. *See, e.g.*, Okla. Stat. tit. 63, § 1-1918(A) (Supp. 1981-82).
3. *See, e.g.*, Ky. Rev. Stat. § 216.520 (1982).
4. Delaware's statute also requires the home to give each resident a copy of the notice of rights and post a copy in a conspicuous place. Del. Code Ann. tit. 16, § 1123 (1975 & Supp. 1980).
5. This language of the act which requires the home to explain the rights and answer any questions of the resident is based upon language from Ill. Ann. Stat. ch. 111½, § 4152-211 (Smith-Hurd Supp. 1982-1983). The language which requires the home to take steps to see that the home complies with the rights is based upon Ill. Ann. Stat. ch. 111½, § 4152-212 (Smith-Hurd Supp. 1982-1983).

Section 10.13. Residents' Representative.

(A) The residents of each home shall elect annually one (1) or more resident representatives. The agency shall prescribe the procedures for the election of the

first representatives of the home. The number of resident representatives in each home shall be determined by the classification of the home as follows:

(1) medium homes — two (2) representatives;

(2) large homes and homes with more than thirty (30) residents — one representative for each six (6) residents.

(B) The resident representatives shall have the following duties:

(1) to assist the home in developing grievance procedures for the home;

(2) to develop, with the assistance of the staff, procedures for their election after the first election at the home;

(3) to communicate resident opinions and concerns to the home;

(4) to obtain information from the home and disseminate the information to the residents; and

(5) to identify problems and participate in the resolution of those problems.

(C) This section shall not apply to small homes.

Section 10.14. Grievance Procedures.

(A) After election of resident representatives, each home shall establish written grievance procedures. All resident representatives shall be actively involved in development of these procedures. The grievance procedures shall include the following elements:

(1) a resident shall have an opportunity to present an oral explanation of his or her complaint;

(2) at least one resident representative shall be permitted to participate in the review of the complaint and shall be permitted to give an advisory opinion;

(3) the resident shall be permitted to be assisted in the presentation of the complaint by any person including but not limited to a relative, advocate, or attorney;

(4) the resident shall be notified of the final decision of the home concerning the resident's complaint within thirty (30) days from the date of the resident's initial complaint;

(5) a copy of the grievance procedures shall be given to each resident and posted conspicuously in the same manner as the notice of residents rights in section 10.12 of this Act.

(B) No action shall be taken against a resident for taking steps to enforce the rights of a resident enumerated in this section or to enforce any other section of this Act.

(C) The agency shall assist medium homes in complying with this section upon request of the home.

(D) This section shall not apply to small homes.

COMMENT

Internal mechanisms, such as resident representatives and grievance procedures, aid in informal resolution of disputes and enhance communication between residents and the home. A number of statutes require the establishment of resident advisory councils in long-term care facilities.[1] Resident advisory councils would appear to be more practical in larger facilities, and at least one statute limits the use of these councils to facilities serving seven (7) or more residents.[2] Rather than require the election of a resident advisory council in each home, the model act requires that individual representatives be elected. The number of resident representatives is dependent upon the number of residents in the home so that in a large home of thirty (30) residents, there is, in effect, a resident's council of five (5) representatives. The duties and functions of the representatives in the model act and resident advisory councils in other statutes are similar.

The act exempts small homes from the requirements of this section because it is anticipated that in a home of eight (8) or fewer persons a formal mechanism for grievances is not needed. In the absence of a formal mechanism for complaint, each resident has the right, as provided for in section 10.3, to receive a reasonable response from the home regarding his or her request.

1. *See, e.g.*, Me. Rev. Stat. Ann. tit. 22, § 7923 (1980 & Supp. 1982); Okla. Stat. tit. 63, § 1-1922 (Supp. 1981-1982); Ill. Ann. Stat. ch. 111½, § 4152-203 (Smith-Hurd Supp. 1982-83).

2. Me. Rev. Stat. Ann. tit. 22, § 7923 (1980 & Supp. 1982).

Section 10.15. House Rules.

(A) Each home may have house rules pertaining to the following rights of residents:

(1) the use of tobacco and alcohol;

(2) the times and frequency of use of the telephone;

(3) visitors;

(4) hours and volume for viewing and listening to television, radio, and phonographs;

(5) movement of residents in and out of the home;

(6) use of personal property;

(7) other areas approved by the agency by regulation.

(B) House rules must be in writing and posted in the facility.

(C) Prior to placement in or admission to a home, a resident shall be given a copy of the house rules of the home to which he or she is seeking admission.

(D) Any house rules which unreasonably restrict the rights of a resident as provided in this Act or any other state statute shall be null and void.

COMMENT

Notwithstanding the rights of the residents set out in section 10, each home may wish to regulate the day-to-

day activities of the home to accommodate the rights of other residents and the home itself. Section 10.15 provides a mechanism for a home to regulate itself and to notify the residents of the rules it adopts.

It is anticipated that house rules may affect in some way the rights of residents as provided in this section. Requiring residents to limit the length of their telephone calls to fifteen (15) minutes will restrict somewhat the right of residents to access of a telephone as provided in section 10.6. However, a home may need to set such a rule to prohibit a few residents from monopolizing the telephone thereby infringing the right of other residents to use it. By requiring in subsection (C) that an individual receive notice of the rules prior to admission, a resident may decide in advance whether the rules are consistent with or infringe upon the lifestyle he or she desires.

If a rule unreasonably interferes with the right of a resident, section 10.15 provides that the rule is null and void. A resident has several alternatives under the act if he or she believes a house rule is unreasonably restrictive. Unless the resident lives in a small home, the resident may use the grievance procedure set out in section 10.15 to seek relief from an unfair or restrictive house rule. Or, in more drastic cases, the resident could bring an action for an injunction under section 32 or for damages under section 33. And, of course, a resident can always informally request a home to modify or revoke a house rule. Finally, a house rule which infringes upon a resident would be a violation of the act and the agency could use its administrative sanctions to bring the home into compliance.

Section 10.16. Information Required to be Given to Residents.

(A) At the time of admission or within thirty (30) days from the effective date of this Act, each resident shall receive, at no cost to the resident, the following:

(1) the notice of rights and names, addresses, and telephone numbers of advocates in the manner provided in section 10.12;

(2) a copy of the written procedures for safekeeping of valuable personal possessions of each resident as provided in section 10.4;

(3) a written statement explaining the residents rights regarding personal funds and listing the services regarding the safekeeping and management of funds for which the resident will be charged as provided for in section 10.5;

(4) if applicable, a written summary of the alternative procedures for safekeeping and management of funds or, if applicable, a statement that the home may not accept funds from the residents in section 10.5;

(5) a copy of the grievance procedures as provided in section 10.14;

(6) a copy of the house rules as provided in section 10.15.

(B) An individual considering admission to a board and care home shall receive, at no cost to that individual, copies of the items listed in subsection (A) upon request to the home. Other interested persons may receive copies of the items upon request to the home.

(C) The requirements of this section shall be in addition to any other requirements for notice to the resident as specified in other sections of this Act.

COMMENT

This section provides a list of all the information which a home is required to give each resident and when the information is required to be given by cross-referencing to the sections which create a substantive right to that information. For its own convenience, a home may wish to prepare a packet of all the information described in this section to be given to each resident at the appropriate time.

Note that other sections may include requirements for notice to the resident in addition to those set out in this section. For example, this section does not relieve the home from its responsibilities under section 10.12 to assist each resident in understanding the resident's rights. In addition, in section 10.15, the house rules must be given to each individual as soon as possible prior to admission and placement so that the resident will be informed in advance of the restrictions which could be placed on him or her by those rules.

Section 10.17. Discrimination Prohibited.

Each resident shall be free from discrimination as provided by state and federal law.

COMMENT

A number of federal laws protect citizens from discrimination in the areas of employment,[1] public education,[2] public accommodations,[3] and general civil and property rights.[4] Although the application of some of the rights secured by federal law are restricted to only federally assisted programs,[5] others, such as prohibition against employment discrimination, are more far-reaching.[6] In addition to federal statutory protections, many states have enacted laws prohibiting discrimination in public accommodations, housing, and education.[7]

Rather than list the areas in which discrimination is prohibited under the model act, section 10.17 merely incorporates by reference the prohibitions against discrimination which exist presently under state and federal law. States enacting the model act may wish to substitute a detailed list of areas in which discrimination is prohibited in lieu of the more general statement contained in section 10.17. A number of state statutes prohibit discrimination in the receipt of services on account of race, creed, color, religion, age, or handicap[8] as well as prohibiting discrimination against an individual because

he or she is a resident of a board and care home.[9] In addition, Oklahoma's statute licensing nursing homes prohibits discrimination against a resident by the home because of that resident's method of payment for services, i.e., the resident is a recipient of Supplemental Security Income rather than a private payee.[10]

1. 42 U.S.C. §§ 2000e *et seq.* (1981).
2. 42 U.S.C. §§ 2000c *et seq.* (1981).
3. 42 U.S.C. §§ 2000a *et seq.* (1981).
4. 42 U.S.C. §§ 1981-1982 (1981).
5. 42 U.S.C. § 2000d (1981).
6. 42 U.S.C. §§ 2000e *et seq.* (1981).
7. *See, e.g.*, Alaska Stat. § 18.80.230 (1981) (public accommodations); § 18.80.240 (1981) (housing); § 14.40.050 (1975) (education); Colo. Rev. Stat. § 24-34-502, § 24-34-601(1982) (public accommodations); § 24-34-402 (1982) (housing); Ill. Stat. Ann. ch. 38 § 13-2 (Smith-Hurd Supp. 1983-84) (public accommodation); ch. 122 § 10-22.5 (Smith-Hurd Supp. 1983-84) (education).
8. *See, e.g.*, Ohio Rev. Code Ann. § 3721.13(A)(3) (Page 1981); N.J. Stat. Ann. § 30-6D-4 (West Supp. 1981); Mich. Comp. Laws Ann. § 333.20201(2)(a) (Supp. 1982).
9. *See, e.g.*, N.J. Stat. Ann. § 55-13B-19(o) (West Supp. 1982).
10. *See, e.g.*, Okla Stat. tit. 63, § 1-1918(B) (Supp. 1981-82).

Section 10.18. Regulations.

The agency shall promulgate regulations as necessary to implement and clarify the rights provided in section 10.

COMMENT

No comment necessary.

SECTION 11. QUALIFICATIONS AND REQUIREMENTS OF ADMINISTRATOR AND STAFF.

Section 11.1. Qualifications of Administrator.

An administrator of a board and care home shall have the following minimum qualifications:

(A) 18 years of age or older;
(B) good moral and responsible character and reputation;
(C) adequate education, training, or experience to carry out the requirements of this Act;
(D) literacy;
(E) management or administrative ability to carry out the requirements of this Act; and
(F) sufficient physical, emotional, and mental capacity to carry out the requirements of this Act.

Section 11.2. Qualifications of Staff.

The staff of a board and care home shall have the following minimum qualifications:

(A) good moral and responsible character and reputation;
(B) adequate education, training, or experience to carry out the requirements of this Act; and
(C) sufficient physical, emotional, and mental capacity to carry out the requirements of this Act.

Section 11.3. Requirements of Administrator and Staff.

(A) A board and care home shall have a staff/resident ratio which is adequate to carry out the requirements of this Act for each category of homes as provided in section 4.2.
(B) The administrator or a staff person shall be responsible for developing leisure activities for residents of large homes and homes with more than thirty (30) residents.
(C) The administrator or a staff person shall be present in a board and care home whenever a resident is present in the home.
(D) In large homes and homes with more than thirty (30) residents, the administrator or a staff person is required to be on duty at all times in which a resident is present in the home.
(E) The administrator and staff of a board and care home shall participate in training programs sponsored by the agency as provided in section 15.

Section 11.4. Regulations.

The agency shall promulgate regulations concerning:

(A) qualifications of the administrator and staff;
(B) staff/resident ratio for each category of homes as provided in section 4.2;
(C) duties of administrator or staff in developing leisure activities and types of leisure activities to be developed; and
(D) any other requirements of an administrator and staff necessary to carry out the purposes and requirements of this Act.

COMMENT

The model act specifies general qualifications for an administrator and staff of a board and care home. These minimum fundamental requirements specifically were included to ensure that the administrator and staff have the basic skills and background to carry out the act's requirements. The requirements are intended to provide guidelines, while allowing the agency to provide greater specificity in regulations. Most board and care licensing statutes do not specify operator or staff qualifications, but instead delegate responsibility to the agency to develop specific qualifications.[1] Some laws use broad language directing the agency to adopt the regulations regarding staff requirements, while others provide more guidance, stating that rules are to be adopted for staff requirements "to insure adequate supervision and care."[2]

This section requires one staff person to be responsible for establishing a program of leisure activities for larger homes to ensure that residents are involved in such activities. These include any social, recreational, cultural, or educational activity for either individuals or groups both outside and inside the home. Unlike small homes in which residents may participate more easily in functions such as shopping, movies, picnics, or other activities with the operator or staff, in large facilities, residents may not be provided with such opportunities. North Carolina's group home regulations require group and individual activities in homes with more than twenty (20) persons, detailing the suggested types of activities.[3]

The model act does not designate a staff/resident ratio, since the agency has greater expertise to decide this issue. The act, however, does require an adequate ratio for each size of homes to carry out the act's requirements. To ensure continuous supervision of residents, the model act further mandates that at least one staff person is to be present in a home whenever a resident is in the home.[4] Moreover, in large homes and homes with more than thirty (30) persons, one person on the staff or the administrator must be in attendance whenever a resident is in the home. In small and medium homes, however, a staff person must be on the premises if a resident is on the premises, but need not be awake at all times.

In section 15, the model act requires the agency to provide training while this section requires the administrator and staff to participate in such training. As discussed in the comment to section 15, this was included because studies of problems in board and care home enforcement reveal that administrators and staff lack knowledge concerning licensing standards and that technical assistance is beneficial in achieving compliance with such standards.[5]

1. *See, e.g.,*Kan. Stat. Ann. § 39-936 (1981); Okla. Stat. tit. 63, § 1-1925(2) (Supp. 1981-1982); Mich. Comp. Laws Ann. § 400.71a(3)(b-d) (Supp. 1982); W. Va. Code §16-5c-5(b)(2) (1979).
2. *See, e.g.*, Mich. Comp. Laws Ann. § 400.710.(3)(d) (Supp. 1982).
3. *Homes for the Aged and Infirm, Minimum and Desired Standards and Regulations, N.C. Dep't. Hum. Resources R.* § III.D.4. (1977).
4. *See* Kan. Stat. Ann. § 39-936 (1981), which requires a "qualified person to be in attendance upon residents at all times," and Mich. Comp. Laws Ann. § 400.2212(1) requiring a responsible person in the home when a resident is in the home, including overnight.
5. *See infra* section 15, notes 4 & 5.

SECTION 12. REQUIREMENTS FOR LOCATION AND PHYSICAL ENVIRONMENT OF HOMES.

Section 12.1. Location.

Board and care homes shall be located in geographical areas which are accessible to supportive services as provided in section 2.5.

Section 12.2. Physical Structure.

(A) Board and care homes shall be maintained internally and externally in good repair and condition.

(B) Board and care homes shall have safe and functioning systems for heating, cooling, hot and cold water, electricity, plumbing, garbage disposal, sewage, cooking, laundry, elevators, artificial and natural light, ventilation, or any other feature of the home.

Section 12.3. Health and Sanitation.

Board and care homes shall be maintained in a clean and sanitary manner, including proper sewage disposal, food handling, and hygiene practices.

Section 12.4. Fire Safety.

(A) The state fire marshal shall promulgate fire safety regulations for board and care homes.

(B) During the initial states of development of the fire safety regulations:

(1) the fire marshal shall notify the agency in writing at the time development of fire safety regulations is initiated;

(2) the agency shall submit written recommendations in response to the notification provided in paragraph (1); and

(3) upon receiving receipt of recommendations as provided in paragraph (2), the fire marshal shall either adopt the recommendations or issue a concise statement to the agency setting forth the reasons for not adopting the recommendations.

Section 12.5. Household Items and Furnishings.

Board and care homes shall have clean, functioning, and safe household items and furnishings.

Section 12.6. Diet.

Board and care homes shall provide a nutritious and balanced diet and shall recognize a resident's need for a special diet.

Section 12.7. Medications.

(A) Residents shall be permitted to self-administer medications, unless otherwise indicated in writing in the resident's board and care plan or physician's certification.

(B) Homes shall ensure that medications are self-administered in a safe and accurate manner.

Section 12.8. Rooms.

(A) Board and care homes shall have bedrooms which are of adequate size.

(B) Bedrooms shall sleep no more than two (2) residents; except that bedrooms may sleep up to four (4) residents upon request of each of the occupants as long as the room is of adequate size.

(C) Board and care homes shall have distinct living and sleeping areas.

(D) There shall be no more than [six (6)] residents per full bathroom.

(E) For medium homes, large homes, and homes with more than thirty (30) persons, there shall be:

(1) one or more rooms for private meetings between residents and other persons, according to the size of the home; and

(2) one or more rooms, in addition to a living room, for social activities, according to the size of the home.

Section 12.9. Regulations.

The agency shall promulgate regulations concerning physical structure, health and sanitation, household items, and furnishings, diet, self-administered medications, and rooms.

COMMENT

The model act establishes certain minimum requirements for board and care homes pertaining to location, physical structure, health and sanitation, household items and furnishings, diet, medications, and rooms. These are intended as guidelines or basic standards, giving the agency authority to adopt regulations providing more detailed requirements in these areas. Detailed facility requirements in such areas generally are found in agency regulations, rather than statutory provisions.[1]

The general requirements for a board and care home included in this section are intended to encourage operators to provide a safe and clean residence, as well as a homelike environment similar to homes occupied by other members of society. Basic physical, health, sanitation, and fire safety standards are required for all homes. Fire safety regulations, however, are to be promulgated by the state fire marshal, with recommendations from the agency.

Many state board and care licensing laws delegate full responsibility for the development and enforcement of fire safety standards to the state fire marshal or local fire departments.[2] This delegation is consistent with the state fire marshal's traditional responsibilities for fire safety in health care facilities and boarding homes.

However, delegating full responsibility for fire safety in board and care homes to state fire marshals presents unique problems. Many state fire marshals rely heavily upon the uniform standards enunciated in the National Fire Protection Association's Life Safety Code when developing state fire safety standards. While the Life Safety Code contains uniform standards for health care occupancies and for residential occupancies that house persons fully capable of evacuation in case of fire, the code does not contain uniform standards for board and care homes.[3] As a result, state fire marshals have had to develop a completely new set of fire safety standards for board and care homes. This has often been done by extracting sections from Life Safety Code chapters addressing non-board and care occupancies. The variety of sections chosen is based upon the fire marshal's experiences with fires in board and care homes in his or her state, rather than through knowledge of the characteristics of the homes and their residents.[4] The result has been a wide variation in the stringency of state board and care fire safety standards. Overly restrictive standards impose prohibitive costs upon operators, detract from a facility's homelike environment, and result in lax or inconsistent enforcement of standards by officials who are reluctant to close down what otherwise appear to be well-operated facilities.[5] Overly lenient standards increase the risk that serious physical injury to residents will result from a fire.[6]

To address this problem the National Bureau of Standards has developed a fire safety system for board and care homes which has been proposed to the National Fire Protection Association for incorporation into the 1985 Life Safety Code as chapter 21. The proposal involves a two-step process for determining the necessary fire safety protections in a particular board and care home. The first step in the process is an evaluation of the evacuation difficulty of the home's residents. This evaluation can be made by using the Fire Safety Evaluation System resident assessment mechanism or any other method chosen by the authority having jurisdiction.[7] Once the home's level of evacuation difficulty has been determined, the building is evaluated by using either the inflexible specifications of proposed chapter 21 or the more flexible Fire Safety Evaluation System.[8] The National Fire Protection Association will consider the proposal during its 1984 meetings. In the interim, states have the option of adopting the proposed standards prior to their incorporation into the Life Safety Code.

The model act includes a mechanism for providing state fire marshals with necessary information regarding the characteristics of the board and care homes and the board and care home residents in their states prior to the development of fire safety regulations.[9] The input of the licensing agency should contribute to the development of workable fire safety regulations that address the unique problems of fire safety in board and care homes.

The broad standards in this section also strive to create a total homelike atmosphere. To achieve a homelike environment, a board and care home should appear inside, as well as out, as much as possible like the surrounding private residences in the community. A homelike environment is shown to have a tremendous impact upon a resident's self-concept and attitudes of others, especially those in the immediate neighborhood.[10] In addition, one commentator has noted that building characteristics,

such as location, size, access, appearance, and design, can facilitate social interaction and integration.[11]

The inside features of a home are particularly important. As one commentator has noted, the internal physical environment can "[e]licit and support many maladaptive behaviors, or it can enhance and support physical as well as personal growth, competence, privacy, comfort, esthetic experience and individuality."[12] Under the act, homes must be in good repair and household items must be clean and functioning. Permitting only two (2) residents per bedroom and six (6) persons per bathroom is intended to prevent overcrowding.[13] Because many small homes or physical structures may have only one or two bathrooms, the resident/bathroom ratio is bracketed to allow, when necessary, a higher number than six (6), although six (6) generally seems to be a reasonable maximum. Requiring additional rooms in larger homes allows for greater privacy and more space, both of which may be less available in such homes.[14] Finally, mandating separate living and sleeping areas assures that residents have space other than their bedrooms in a home in which to carry out daily living activities.

Additionally, a board and care home's location is critical to achieving physical and social integration of residents.[15] In addition to requiring operators to assist residents in obtaining supportive services as part of the definition of a board and care home, this section of the act requires a home to be accessible to such services. Distance is one factor, although more important is the accessibility of activities or services by means of convenient public or private transportation.[16] Location of a home in a rural area far removed from services or activities may involve an isolated setting if residents do not have access to a private car or other vehicle and no public transportation exists. On the other hand, if transportation is available, such a setting may not be considered isolated, particularly if the entire surrounding geographical area also consists of "isolated" rural residences. Some states' regulations impose requirements concerning an accessible location.[17]

The act requires that a home is to provide residents with a nutritious and balanced diet or a special diet when necessary, since it is considered one of the most important aspects of a board and care home which provides quality care.[18] In addition, section 10.3 gives a resident a right to a nutritious diet. Finally, this section intends to make clear that residents have a right to self-administer medications, and only permits a home to supervise for safety and accuracy.

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1. *See, e.g.*, Kan. Dept. Health & Env. H.R. §§ 28-39-76 *et seq.* (1982); Homes for the Aged and Infirm, Minimum and Desired Standards and Regulations, N.C. Dept. Hum. Resources R. (1977); N.Y. Dept. Soc. Serv. R. §§ 485-491 (1978); Tenn. Dept. Pub. Health R. §§ 1200-8-11 *et seq.* (1979).

2. *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-424(D) (1974 & Supp. 1982-1983); Iowa Code Ann. § 135C.14 (West 1972 & Supp. 1982-1983); Me. Rev. Stat. Ann. tit. 22, § 7904 (1980 & Supp. 1982); Miss. Code Ann. § 43-11-13 (1972 & Supp. 1980); Mont. Code Ann. § 53-20-307 (1981); N.H. Rev. Stat. Ann. § 151:9 III (1981 & Supp. 1982); Ohio Rev. Code Ann. § 3721.02 (Page Supp. 1981); Wash. Rev. Code Ann. § 18.20.130 (1978 & Supp. 1982); W. Va. Code §§ 16-5C-9, 27-17-1 (1979 & Supp. 1982). A recent survey of board and care homes in seven states found that over 80 percent of the facilities surveyed had been inspected by a fire department within the year prior to the survey. N. Dittmar, G. Smith, J. Bell, C. Jones, & D. Manzanares, *Board and Care For Elderly and Mentally Disabled Populations* 101 (Denver Research Institute 1983).

3. Life Safety Code chs. 12, 13, 16, 17, 18, 19 & 20 (National Fire Protection Association 1981).

4. Telephone inteview with Goerge Oster, Chief Instructor, Fire Service Education, Iowa State University (November 9, 1983).

5. Nelson & Levin, *A Fire Safety Evaluation System for Board and Care Homes*, at 3-4 (1983).

6. *See generally Fires in Boarding Homes: The Tip of the Iceberg: Hearings Before the House Select Committee on Aging,* 96th Cong., 1st Sess. (1979).

7. Nelson & Levin, *supra* note 5, at 8.

8. *Id.*

9. Provisions for cooperative efforts between the fire marshal and licensing agency in the development of fire safety regulations appear in Fla. Stat. Ann. § 400.441 (West 1981); Ind. Code Ann. § 16-10-4-5(a)(2) (Burns Supp. 1980); Mich. Comp. Laws Ann. § 400.710 (Supp. 1982); and Okla. Stat. tit. 63 § 1-1908 (Supp. 1981-1982).

10. W. Wolfensberger, *The Origin and Nature of Our Institutional Models,* in *Changing Patterns in Residential Services for the Mentally Retarded* 36 (R. Kugel & A. Shearer eds. rev. ed. 1976). Wolfensberger points out that physical environment influences expectations which, in turn, influence behavior. *Id.* To promote a homelike environment, one state's regulations require the provision of an "attractive, homelike, and comfortable atmosphere." N.C. Dept. Hum. Resources R. § III, 4.

11. W. Wolfensberger, *The Principle of Normalization in Human Services* 73 (1972). *See also* 42 CFR 405.1134(j) (1982), federal regulations regarding environmental considerations in skilled nursing facilities, requiring facilities to provide a "functional, sanitary, and comfortable environment. . . . Provision is made for adequate and comfortable lighting levels in all areas, limitation of sounds at comfort levels, maintaining a comfortable room temperature. . .and adequate ventilation through windows or mechanical means or both."

12. W. Wolfensberger, *supra note* 11, at 74. Wolfensberger continues,

> Perhaps most immediately, desirable features would include adequate warmth, and ventilation; a cheerful, colorful decor; and absence of noxious odors and excessive or constant noise. Where counseling is rendered, there should be privacy. Privacy can also be expressed in toilet design and in living arrangements of residential buildings. Furniture and waiting areas should be comfortable, and there should be decorations such as curtains, pictures, sculptures, plants, etc.
> A very important part of the normalization principle is to enable persons to experience rhythm of the day and the year, the change in weather and in seasons . . . .

13. Some states' regulations allow four (4) residents per bedroom and up to ten (10) residents per full bathroom. *See, e.g.*, N.Y. Dept. Soc. Serv. § R § 490.7(e) (ten residents per shower); Mich. Adult Foster Care R. §§ 400.2331 (8), 400.2333 (8) (1975) (eight residents per bathroom and four residents per bedroom); Tenn. Dept. Pub. Health R. § 1200-8-11-.14(4) & (5) (eight residents per shower).

14. *See* Mich. Adult Foster Care R. § 400.2332, which requires, in group homes of 7-20 persons, ". . .1 or more attractively furnished multi-purpose areas of adequate size for training, recreational family style dining and other diversional and social activities."

15. W. Wolfensberger, *supra* note 11, at 48.

16. *Id.*

17. *See, e.g.*, Homes for the Aged and Infirm, Minimum and Desired Standards and Regulations, N.C. Dept. Hum. Resources R. § III.C.1; N.Y. State Dept. Soc. Serv. R. § 486.1(b)(5).

18. *See* 42 C.F.R. §405.1125 (1982), federal regulations which cover *Dietetic Services* for skilled nursing facilities which receive Medicaid or Medicare, and provide excellent guidance regarding diet and nutrition. *See also* N.C. Dept. Hum. Resources R. § II; D; 2 for state regulations concerning diet requirements.

SECTION 13. BOARD AND CARE HOME REGISTRY ESTABLISHMENT AND AVAILABILITY.

(A) The agency shall establish and maintain a statewide registry of licensed board and care homes. For each home listed, the registry shall include, but not be limited to:

(1) the name of the home;

(2) the name of the licensee of the home;

(3) the address and telephone number of the home;

(4) the number of residents the home is licensed to serve; and

(5) if the home limits the populations it serves, the populations served in the home.

(B) The agency shall make copies of the registry available upon request to:

(1) federal, state, county, or municipal agencies;

(2) private placement or referral agencies; and

(3) any other interested individual, group, or agency.

COMMENT

Registries that provide basic information to the public regarding the availability of licensed homes appear in Hawaii's and New York's board and care licensing laws.[1] One purpose of the registry is to provide public and private agencies and individuals with information about board and care homes for referrals of potential residents.

The licensing agency should be required to maintain the registry for two reasons. First, the agency has access to all necessary information. Second, the Keys Amendment requires that the state regulatory agency give each resident of a facility a list of licensed facilities if the facility in which he or she is residing is not in compliance with state standards.[2]

Wide distribution is necessary if the registry is to be effective in providing information to the public. Because the costs of distributing the registry may place a financial burden upon the agency, the act authorizes the agency to charge a fee which does not exceed the costs of reproduction.

1. Hawaii Rev. Stat. § 346-96 (Supp. 1981); N.Y. Soc. Serv. Law § 463 (McKinney Supp. 1981-1982).

2. 45 C.F.R. § 1397.20(b)(3)(ii) (1982).

SECTION 14. CONSULTATION BY AGENCY.

(A) The agency shall provide consultation to the following persons upon request:

(1) any licensee of a board and care home; and

(2) any person interested in obtaining a license to operate a board and care home under this Act.

(B) As used in this section, consultation includes:

(1) an explanation of the requirements of this Act and regulations promulgated under the Act;

(2) an explanation of license application and renewal procedures; and

(3) any other information necessary to promote compliance with the requirements of this Act.

COMMENT

Consultation often is cited by state board and care agencies as one of the most effective and frequently used methods of promoting compliance with licensing standards.[1] In addition to providing an opportunity for a conference when violations are found in a home, the model act makes consultation available to all homes and to any person seeking a board and care home license.[2] Explanation of licensing requirements during the license application and renewal processes increases the likelihood that a home will be in compliance at the beginning of its yearly licensing term. The agency's availability to provide consultation during the term of the home's license promotes continued compliance with the act. For example, the agency could provide a home with information regarding financing alternatives to assist homes with renovations. However, consultation does not mean that the agency will undertake substantive functions such as bookkeeping or meal planning for the home. This responsibility would be administratively burdensome for the agency.

1. R. Stone, M. Saunders, & R. Newcomer, *Descriptive Analysis of Board and Care Policy Trends in the 50 States* 16 (unpublished paper of the Aging Health Policy Center, Univ. of Calif. at San Francisco, Sept. 1982).

2. This section is adapted in large part for N.D. Cent. Code § 50-18-07 (1981).

SECTION 15. TRAINING.

Section 15.1. Training of Administrator and Staff.

(A) The agency, directly or through alternative means, shall provide a training program to the licensee, administrator, or staff of each board and care home at the time the home is first issued a license under this Act.

(B) If a board and care home is in violation of this Act in an area specified in subsection (C), the agency may require the licensee, administrator, or staff to attend the training program in the deficient area.

(C) The training program shall include but not be limited to thorough coverage of the following areas:

(1) implementation of the board and care plan;

(2) characteristics of client disabilities;

(3) recognition of resident health care and mental health problems;

(4) identification and use of community resources;

(5) social and recreational activities;

(6) nutrition, basic hygiene, and dental care;

(7) first aid;

(8) management of medications;

(9) home management, administration, and recordkeeping;

(10) maintenance of the home in a safe and sanitary manner; and

(11) resident rights, including management of resident funds and awareness of federal and state laws prohibiting discrimination.

(D) The agency shall cooperate with persons providing voluntary continuing education to board and care home licensees, administrators, and staff by:

(1) responding to reasonable requests for assistance in the development of course curricula from persons sponsoring continuing education programs; and

(2) providing notice of continuing education programs to all licensed board and care homes.

COMMENT

Many administrators and staff of board and care homes are lay people who may have little or no background in the skills needed to care for disabled persons.[1] In response to this problem, several state licensing laws require training of administrators and staff.[2] Other state licensing agencies have instituted training programs without explicit statutory authority.[3] In states with few or no training opportunities, the need for training has been noted.[4] The beneficial results of training programs include better managed and safer homes and greater staff sensitivity to the needs of residents.[5]

The model act provides for training to board and care home administrators and staff when it is most necessary: (1) when a home initially is issued a license under the act; and (2) when violations in a home already operating indicate a need for staff training in particular areas. Training at the beginning of a home's operation increases the likelihood that it will be capable of maintaining compliance with the requirements of the act. Staff of homes that have been operating for a number of years already may have acquired through experience the skills necessary to operate a board and care home. Required participation of these persons in specified components of the training program satisfies the need for staff training in particular areas without imposing an excessive financial burden upon the agency. The mandate that the agency cooperate with organizations outside of state government sponsoring continuing education programs supports the concept of voluntary continuing education for board and care home administrators and staff.

Training can be provided by the licensing agency directly, or through joint efforts with community colleges, private training organizations, state board and care home associations, or other agencies involved in delivery of services to board and care home residents.[6] The state might also design a correspondence course program for administrators and staff of very small or geographically isolated homes. The areas of training specifically included in this section relate to the skills needed most by board and care home administrators and staff.[7]

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1. The long-term care ombudsman for metropolitan Atlanta found that board and care home operators are typically women who may have practical experience, but no professional or specialized education or training in dealing with mental illness, retardation, or the elderly. Some operators are elderly themselves and have been in the business since the advent of deinstitutionalization decades ago. M. McClave, *Personal Care Homes: Nowhere Else to Go*! 6 (rev. Oct. 1982) (unpublished report by the Long Term Care Ombudsman program of Metropolitan Atlanta, Ga.).

   A 1979 General Accounting Office study found that only one-half of the board and care operators interviewed had experience in a health-related occupation (registered nurse, practical nurse, nurse's aide). Only one-third said they had received training in diet and nutrition, counseling services, behavioral training, medication services, or first aid. Comptroller General's Report to the Congress, *Identifying Boarding Homes Housing the Needy, Aged, Blind and Disabled: A Major Step Toward Resolving a National Problem,* 11 (General Accounting Office HRD 80-17, Nov. 19, 1979).

2. Hawaii Rev. Stat. §§ 321-15.6, 346.94(c) (Supp. 1981); Cal. Health & Safety Code § 1562 (West 1979 & Supp. 1981).

   Other states' licensing laws leave training to the agency's discretion. *See, e.g.*, Fla. Stat. Ann. § 400.452 (West 1981) (operators and staff); W. Va. Code § 16-5C-3; (1979) (administrative, management, and operational personnel).

3. For example, in Mississippi, the State Department of health offers some training in bookkeeping skills and the South Carolina Department of Mental Health provides nutrition consultation. In Oklahoma, four nurses and two dieticians provide free in-service education programs upon request in the areas of nursing care, nutrition and CPR. R. Stone, M. Saunders, & R. Newcomer, *Descriptive Analysis of Board and Care Policy Trends in the 50 States* 16 (unpublished paper of the Aging Health Policy Center, University of Calif. at San Francisco, Sept. 1982).

4. The Atlanta, Georgia, long-term care ombudsman recommends that training be given to board and care home operators and staff by the licensing agency concerning the regulations and by experienced professionals on proper care and treatment of the mentally ill. *See* M. McClave, *supra* note 1, at 23. The Florida ombudsman recommended training on at least an annual basis, with additional training programs provided for operators and staff of all types of group care homes through community colleges and area vocational schools. Excerpt from Office of Program Developments, Administration on Aging, *Executive Summary; The Long Term Care Ombudsman Program; National Summary of State Ombudsman Reports for FY 1981* (Oct. 1982).

5. Dubin & Ciavarelli, *A Positive Look at Boarding Homes*, 29 Hospital and Community Psychiatry 593, 593-594 (Sept. 1978).

6. For example, the North Carolina Association of Long Term Care Facilities requires potential members to engage in training provided by the association as a condition of approval. C. Harmon, *Board and Care: An Old Problem, A New Resource for Long-Term Care*, 24 (Center for the Study of Social Policy, Washington, D.C. June

30, 1982). Iowa and California conduct their mandated residential care facility operator certification program through each state's community college system.

7. This list is adapted from training curricula developed by the District of Columbia's Central Referral Bureau for community residential facility operators and by Pennsylvania's Domiciliary Care Program. Some state board and care operator training programs include specialized treatment or rehabilitation training. This approach is not adopted in the model act. Specialized service needs of residents will be identified by the service coordinator developing the board and care plan or by the resident's phyician and will not be provided to residents by the board and care home.

Section 15.2 Regulations.

The agency shall promulgate regulations in the following areas to carry out the requirements of this section:

(A) curriculum for each subject area of training; and

(B) any other regulations necessary to carry out the requirements of this section.

SECTION 16. BOARD AND CARE COUNCIL.

Section 16.1. Membership.

(A) The licensing agency shall establish a state level board and care council consisting of [eighteen (18)] members appointed by the governor.

(1) The director of the licensing agency shall serve as chairman of the council.

(2) The members of the council shall be:

(a) the director of the [state social services agency] or his or her designee;

(b) the director of the [state health department] or his or her designee;

(c) the director of the [state mental health agency] or his or her designee;

(d) the director of the [state developmental disabilities agency] or his or her designee;

(e) the director of the state office on aging or his or her designee;

(f) the state fire marshal or his or her designee;

(g) the state long term care ombudsman or his or her designee;

(h) the director of the state protection and advocacy system for developmentally disabled persons or his or her designee;

(i) an advocate for mentally ill citizens in the state;

(j) an advocate for physically disabled citizens in the state;

(k) four (4) administrators or licensees of licensed board and care homes; and

(l) four (4) residents of board and care homes.

(B) In appointing the first members of the council who are not state agency representatives, the governor shall appoint five (5) members for a term of two (2) years and five (5) members for a term of three (3) years. After the initial appointment, members who are not state agency representatives shall serve three (3) year terms. A vacancy shall be filled for the remainder of the unexpired term from the same class of persons represented by the outgoing member.

COMMENT

Several long-term care facility licensing laws provide for an interdisciplinary council.[1] Under the model act, members of the board and care council, other than state agency directors, are appointed by the governor. The purpose of gubernatorial appointments is to ensure balanced representation on the council and to enhance its public accountability. Approximately one-half of the interdisciplinary council provisions surveyed provide for gubernatorial appointments.[2] The remaining states provide for appointment of the council's members by the director of the licensing agency.[3] This approach may be more practical if a state legislature is not receptive to the concept of gubernatorial involvement in a council addressing board and care home issues.

The general intent behind the board and care council is the creation of a mechanism for coordination among the multiple state agencies responsible for regulating residential facilities and for providing services to residents of those facilities.[4] Residents of board and care homes may be aged, mentally ill, physically handicapped, or some combination thereof. The delivery of needed services to these individuals is dependent upon cooperation among the licensing agency, the agency or agencies administering the board and care plan, the agencies controlling the supportive services networks for each of the diasability groups, the agencies administering the public benefits received by the residents, and resident advocacy organizations or agencies.[5] In addition, the participation of board and care home licensees, administrators, and residents ensures the involvement in policymaking and regulatory development of those directly affected by the state's board and care program.

The names of the agencies listed in section 16.1(A)(2) are bracketed, since agency titles vary from state to state. Variations in the organization of state governments may necessitate a state's alteration of the structure of the council in the model act. For example, in a state with an umbrella human services agency, the council would be composed of the heads of the divisions responsible for each of the areas set out in section 16.1(A)(2). Regardless of the structure of the state government, the council's composition must reflect each unit of the state government included in section 16.1(A)(2).

1. *See, e.g.*, Conn. Gen. Stat. Ann. § 19-626 (West 1977 & Supp. 1982); Ill Ann. Stat. ch. 111½, § 4152-204 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. § 16-10-4-3 (Burns Supp. 1980); Mich. Comp. Laws Ann. § 400.708 (West Supp. 1982).

2. Ind. Code Ann. § 16-10-4-3 (Burns Supp. 1980); N.J. Stat. Ann. § 26:2H-4 (West Supp. 1982); Okla. Stat. tit. 63, § 1-1923 (Supp. 1981-1982).
3. Fla. Stat. Ann. § 400.437 (West 1981 & Supp. 1982); Ill. Ann. Stat. ch. 111½, § 4152-204 (Smith-Hurd Supp. 1982-1983); Mich. Comp. Laws Ann. § 400.708 (West Supp. 1982).
4. For a discussion of the coordination problem in nursing home regulation, *see* Butler, *Assuring the Quality Care and Life in Nursing Homes: The Dilemma of Enforcement,* 57 N.C.L. Rev. 1317, 1329 (1979).
5. The need for interagency coordination is illustrated in a recent report of the Tennessee long term care ombudsman:

> Complaint resolution and problem solving entailed many contacts, consultations, and/or referrals. There were 159 consultations/referrals to 118 clients.
>
> | | |
> |---|---|
> | State Licensing Agency | 31% |
> | Legal Services | 7% |
> | Protective Services | 19% |
> | Others | 39% |
>
> Tennessee Commission on Aging, *Boarding Home Study* 10 (1982).

Section 16.2. Powers and Duties.

The board and care council shall have the following powers and duties:

(A) to make policy recommendations regarding the coordination of licensing and enforcement standards in board and care homes and the provision of services to board and care home residents;

(B) to advise the agency regarding methods for identification of unlicensed board and care homes;

(C) to advise the agency during development and revision of regulations as provided in section 6; and

(D) to review and comment upon proposed regulations.

COMMENT

The board and care council has broad advisory responsibilities under the model act.[1] However, its efforts are focused upon two areas in which it is uniquely qualified to advise the agency. First, since the council has representatives of the agencies responsible for both the regulation of board and care homes and the provision of services to board and care home residents, it can coordinate policymaking between the two state government tasks. Second, the council's members represent each agency or service provider that may come into contact with an unlicensed home.[2] For example, a long-term care ombudsman receives and investigates complaints regarding both licensed and unlicensed homes.[3] The ombudsman would have important ideas as to how best to allocate limited agency resources to the identification and pursuit of unlicensed homes.

The council's active participation in rulemaking assures that greater consideration will be given to the benefits and drawbacks of regulations under consideration by the agency. Participation of residents and board and care home licensees and administrators provides particularly valuable information and analysis regarding the potential impact of regulations.

1. The majority of interdisciplinary councils in state long-term care facility licensing laws have advisory functions. *See, e.g.*, Conn. Gen. Stat. Ann. § 19-626 (West 1977 & Supp. 1982); Fla. Stat. Ann. § 400.437 (West 1981 & Supp. 1982); Ill. Ann Stat. Ch. 111½, § 4152-204 (Smith-Hurd Supp. 1982-1983); Mich. Comp. Laws Ann. § 400.708 (West Supp. 1982). A few statutes give councils the power to adopt and approve regulations, rather than limiting the council's power to regulatory oversight. *See, e.g.*, Ind. Cond Ann. § 16-10-4-5 (Burns Supp. 1980); N.J. Stat. Ann. § 26:2H-4 (West Supp. 1982).
2. For example, the agency administering board and care plans for mentally ill clients is actively engaged in locating placements for its clients. During this search for placements, the service coordinator will occasionally identify a suspected unlicensed home.
3. In Tennessee, the long-term care ombudsman handled a total of 118 cases regarding board and care or boarding house clients in 1982. Of those, 58 cases were in 20 unlicensed homes. In an attempt to address the problems in unlicensed homes, the ombudsman has developed working relationships with local licensing authorities. Tennessee Commission on Aging, *Board Home Study* 2, 12 (1982).

Section 16.3. Meetings.

(A) The board and care council shall meet quarterly.

(B) Meetings of the council shall be open to the public. Notice of the time, date, and place of the meetings shall be published in the administrative bulletin and major newspapers of the state.

(C) The agency shall provide:

(1) staff necessary to assist the council in performing its duties; and

(2) space for meetings and council.

COMMENT

Section 16.3 governs the procedures for meetings of the board and care council.[1] A majority of licensing laws providing for councils require quarterly meetings.[2] Since the council is located administratively within the licensing agency, that agency is given the duty to provide the council with staffing and meeting space needed by the council.

1. Adapted from Conn. Gen. Stat. Ann. § 19-626a (West 1977 & Supp. 1982); Mich. Comp. Laws Ann. § 400.708 (West Supp. 1982); Ill. Ann. Stat. ch. 111½, § 4152-204 (Smith-Hurd Supp. 1982-1983); Okla. Stat. tit. 63, § 1-1923 (Supp. 1981-1982).
2. The average frequency of meetings is quarterly. *See* Ariz Rev. Stat. Ann. § 36-553(c) (Supp. 1982-1983); Ill. Ann. Stat. ch. 111½, § 4152-204(b); N.J. Stat. Ann. § 26:2H-4 (West Supp. 1982).

Section 16.4. Reimbursement of Expenses.

Members of the board and care council shall be reimbursed by the agency for their actual expenses incurred in the performance of their duties.

COMMENT

No comment necessary.

SECTION 17. LICENSING.

Section 17.1. License Requirement.

A license issued by the agency as provided in this Act is required to operate a board and care home.

COMMENT

A majority of the state board and care programs in the country are licensing programs.[1] However, the procedures for issuing a license and the standards with which facilities must comply vary widely from state to state. Instead of licensing, some states have programs for certifying or approving board and care homes through a formal or informal administrative process or through the use of purchase or service contracts.[2]

Board and care home licensing statutes normally contain a provision formally stating that a license is required to operate a board and care home. Operation of a home without a license is a violation of the model act and constitutes a ground for criminal penalties and other enforcement sanctions, including receivership, injunction, civil penalties, and transfer of residents.

A state derives its authority to license board and care homes from its police power.[3] A license may be required pursuant to a state's police power if its primary purpose is related to the regulation of a business, profession, or industry for the protection of the state's citizens.[4] The state therefore may require licensing of board and care homes since its purpose is to regulate the industry in order to protect its consumers.[5]

Through licensing, a state can establish and enforce minimum standards governing board and care homes.[6] It is this function of a license requirement which makes it the most basic enforcement mechanism available to states. Licensing also serves purposes in addition to regulation. Through licensing, states can learn of the existence of a facility, its location and the number of residents, and the identity of its owner.[7] The information obtained by the state through its identification process can be used not only to determine whether the facility is meeting standards but also whether residents are receiving available community services. As provided in section 7, the state also may disseminate the information it receives regarding facilities through the licensing process so that they will know the location and availability of licensed homes.

1. *See State Laws and Programs Serving Elderly Persons and Disabled Adults,* 7 Mental Disability L. Rep. 158, 181-188 (1983).
2. *See, e.g.*, Wyo. Stat. § 35-1-620 (1977 & Supp. 1982).
3. A state derives its authority to license an industry or profession from either its constitutional power to tax or its police power. If the state's primary purpose in licensing is to raise revenues, then the state's authority is derived from its power to tax. A license also may be required by the state police power if its primary purpose relates to the regulation of a business, profession, or industry for the protection of the state's citizens.
4. Numerous decisions of the U. S. Supreme Court have recognized a state's authority to license an industry as a valid exercise of its police power. *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412 (1937); *Brazee v. Michigan*, 241 U.S. 340 (1916); *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lieberman v. Van de Carr*, 199 U.S. 552 (1905).
5. *See* Annot., 97 A.L.R. 2d 1187 (1964 & Supp. 1976 &1982). In *Goodin v. State ex rel. Oklahoma Welfare Commission*, 436 F. Supp. 583 (D. Okla. 1977), a federal district court held Oklahoma's nursing home statute (the predecessor to the existing nursing home statute which also provides for licensing of board and care homes) was constitutional stating:

> It is well recognized that the operation of an institution for shelter, feeding and care of the sick, aged or infirm bears a reasonable relation to the health, safety and welfare of the community and is subject to licensing and regulation as a valid exercise of the police power of the State.
> Id. at 585.

6. Commission on Legal Problems of the Elderly, American Bar Association, *Model Recommendations: Intermediate Sanctions for Enforcement of Quality Care in Nursing Homes* 5 (1981).
7. *See, e.g.*, Cal. Health & Safety Code § 1536 (1979 & Supp. 1981) (statute requires that the agency maintain and publish a list of all licensed facilities which list is available to the public).

Section 17.2. Application for License.

(A) An application for a license to operate a board and care home shall be made to the agency on forms furnished by the agency.

(B) All applications shall be accompanied by the license application fee established by the agency. The license fee schedule shall be based upon the size of the home.

(C) The application shall be under oath and shall contain the following information:

(1) the name and address of the applicant;

(a) If the applicant is an agency, corporation, partnership, association, or any other form of organization, the application shall include the name, address, and official position of all persons who have an ownership interest in the board and care home.

(b) If the applicant is a political subdivision of the state, the application shall include the name and address of the political subdivision's chief executive officer.

(c) If the applicant is the lessee of the premises in which the home will be operated, the application shall include the name and address of the lessor of the premises and any direct or indirect interest that the applicant has in the lease other than as a lessee.

(2) sufficient evidence that each person with an ownership interest of ten (10) percent or more in the home meets the qualifications specified in section 17.3(A)(1);

(3) the name and address of the home for which the license is sought;

(4) the name and address of the administrator of the home;

(5) sufficient evidence that the administrator of the home meets the requirements specified in section 17.3(A)(2); and

(6) the number and type of residents that will be served in the home.

(D) The agency shall have the authority to investigate any information included in the application for a license.

COMMENT

The model act's requirements regarding the content of the license application are adapted from similar provisions in the board and care licensing laws of Illinois, Michigan, and Oklahoma.[1] The act mandates disclosure of all persons with an ownership interest in the home so that the agency and others will know who has ultimate responsibility for the home's operation. The act's requirements relating to age, character, experience, and financial resources provide the agency with the information needed to determine whether issuance of a license to the applicant named would be appropriate.[2]

Many board and care licensing laws set a fixed license fee or range of fees. Due to the wide range of licensing structures throughout the states, the model act does not specify a license fee.[3] However, it does direct the agency to fix the fee based upon the size of the home. This direction reflects the increased expenses of agency investigation of larger homes.

1. Ill. Ann. Stat. ch. 111½, § 4153-103 (Smith-Hurd Supp. 1982-1983); Mich. Comp. Laws Ann. § 400.713 (Supp. 1982); Okla. Stat. tit. 63, § 1-1904 (Supp. 1981-1982).

2. The vast majority of states require at least some affirmative evidence by the applicant of compliance or of ability to comply with state standards. *See, e.g.*, Conn. Gen. Stat. Ann. § 19-577 (West 1977 & Supp. 1982); Miss. Code Ann. § 43-11-7 (1972 & Supp. 1980); Minn. Stat. Ann. § 144.51 (West Supp. 1982-1983); S.D. Codified Laws Ann. § 34-12-5 (1976 & Supp. 1982); Wyo. Stat. § 35-2-104 (1977 & Supp. 1982).

   Minimum qualifications of a licensee also are required in a number of statutes in the following areas:

   age - *E.g.*, Mich. Comp. Laws Ann. § 400.713(3)(e) (Supp. 1982); S.D. Codified Laws Ann. § 34-12-5 (1976 & Supp. 1982).

   good moral and responsible character, reputation, or integrity -*E.g.*, Md. Ann. Code art. 7, § 416 (Supp. 1982-1983); Tenn. Code Ann. § 33-1806 (Supp. 1982).

   adequate education, training, and experience - *E.g.*, Mich. Comp. Laws Ann. § 400.710(3)(b) (Supp. 1982).

   adequate financial resources - *E.g.*, Cal. Health & Safety Code § 1522 (West 1973); Fla. Stat. Ann. § 400.411 (West Supp. 1982); Ill. Ann. Stat. ch. 111½, § 4153-103(3) (Smith-Hurd Supp. 1982-1983); Mich. Comp. Laws Ann. § 400.713 (1982); Okla. Stat. Ann. tit. 63, § 1606 (1979); Va. Code § 63.1-123(f)(3) (Supp. 1980).

   prior violations of act resulting in imposition of sanction -*E.g*, N.Y. Soc. Serv. Law § 460-3 (McKinney Supp. 1981-1982); Okla. Stat. Ann. tit. 63, § 1-1904 (Supp. 1981).

   management or administration ability - *E.g.*, Ind. Code Ann. § 16-10-4-5(a)(4) (Burns Supp. 1980.); Mass. Ann. Laws ch. 111, § 72(u) (Michie/Law Co-op. 1975 & Supp. 1982); Mich. Comp. Laws Ann. § 400.710(a)(i)(j) (Supp. 1982). *See also* Ill. Stat. Ann. ch. 111½, § 4153-208 (Smith-Hurd Supp. 1982-1983) requires the filing of an annual financial statement.

3. The amount of the licensing fee ranges from as high as two hundred dollars ($200.00), Ill. Ann. Stat. ch. 111½ § 4153-103(2) (Smith-Hurd. Supp. 1982-1983) to as low as five dollars ($5.00), S.C. Code Ann. § 43-28-20 (Law Co-op. Supp. 1982). Several states charge a fee in the ragne of twenty-five dollars ($25.00). *See, e.g.*, Idaho Code § 39-3304 (1977 & Supp. 1982); Okla. Stat. tit. 63, § 1-1905 (Supp. 1981-1982); Tex. Rev. Civ. Stat. Ann. art. 4442c, § 4 (Vernon 1976 & Supp. 1982-1983).

Section 17.3. Issuance of a License; Right to Contest License Denial.

(A) The agency shall issue a license to a board and care home if, after inspection as provided in section 20 and any discretionary investigation as authorized in section 17.2, the agency finds that:

(1) the applicant meets the following qualfications:

(a) age not less than eighteen (18) years old;

(b) reputable and responsible character;

(c) sufficient education, business, or professional experience to carry out the requirements of the Act;

(d) sufficient financial resources to carry out the requirements of the Act;

(e) no convictions for crimes that have a bearing upon the applicant's suitability to operate a board and care home, unless the applicant shows that:

(1) the crime occurred more than five (5) years ago; and

(2) he or she has been sufficiently rehabilitated; and

(f) no prior violations of this Act relating to this or any other home or of any other law regulating residential care facilities within the past five (5) years which resulted in revocation or nonrenewal of a license;

(2) the administrator named in the license application meets the minimum requirements for an administrator of a board and care home as provided in section 11.1; and

(3) the home is in substantial compliance with the requirements of the Act.

(B) The agency shall serve a copy of the decision granting or denying an application for a license which includes the findings in support of the decision and notice of the right to contest the decision as provided in subsection (c) upon the applicant personally or by certified mail.

(C) A license applicant shall have the right to contest denial of his or her application for a license in

accordance with the adjudication procedures as provided in section 6.

(D) If a license applicant intends to contest denial of his or her application for a license, the license applicant shall request a hearing in writing within ten (10) days after receipt of notice of the denial.

COMMENT

Some state board and licensing statutes require an inspection of the home as a prerequisite to issuance of a license.[1] Others require an investigation of the license applicant, either in addition to or instead of an inspection requirement.[2] By permitting investigation of the information in the license application and requiring inspection of the home prior to license issuance, the model act ensures that each home licensed by the state will be in substantial compliance with the act as it begins operation. This also provides greater assurance that a home is likely to remain in compliance throughout the full term of its license.

In the alternative, a number of state board and care licensing laws do not require inspections but provide for issuance of a license upon approval only of the application's contents.[3] This approach avoids the delay that might be caused by a pre-license inspection in a state with limited inspection personnel. However, the potential consequence of not conducting a pre-license inspection is the issuance of a license to a substandard board and care home. This result is much more severe than the reasonable delay in license issuance experienced by the license applicant as a result of the agency's investigation and inspection.

The act's specification of the agency's findings prior to issuance of a license serves a dual function. First, it ensures that the agency will consider the information essential to making a determination that an applicant home will operate in compliance with the act. Second, it provides the basis from which an applicant who is denied a license can challenge the propriety of the agency's decisions. Subsection (A)(1)(e) is designed to avoid an absolute prohibition against operation of a board and care home by persons who have criminal convictions in their past which bear upon their suitability to operate a board and care home.[4]

The right of a license applicant to contest denial of his or her application for a license provides a mechanism for ensuring that the agency does not arbitrarily or erroneously deny an application.[5] This protects a license applicant who may have expended considerable time and financial resources in bringing the physical structure of a home into compliance with the act's requirements and locating an administrator for the home.

1. *See State Laws and Programs Serving Elderly Persons and Disabled*, 7 Mental Disability L. Rep. 158, 181-188 (1983). *See, e.g.*, Mich. Comp. Laws Ann. § 400.713(3) (supp. 1982); Ill. Ann. Stat. ch. 111½, § 4153-109 (Smith-Hurd Supp. 1982-1983).
2. *See, e.g.*, Md. Ann. Code art. 7, § 406 (1982 & Supp. 1982); Minn. Stat. Ann. § 245.783 (West Supp. 1982-1983).
3. *See, e.g.*, N.J. Stat. Ann. § 26:2H-12 (West Supp. 1982); Tenn. Code Ann. § 33-1806 (1977 & Supp. 1982).
4. Similar provisions appear in N.D. Cent. Code § 25-16-03.1 (Supp. 1981) and Okla. Stat. Ann. tit. 63, § 1-1906(c)(2) (Supp. 1981).
5. *See,* section 23.3 & Comment, *supra* for a discussion of rights to contest agency actions generally.

Section 17.4. Content of License.

A license to operate a board and care home shall state:

(A) the date the license was issued;

(B) the name of the licensee;

(C) the address of the home to which the license applies;

(D) the number of residents the home is licensed to serve; and

(E) the expiration date of the license.

COMMENT

Section 17.4 ensures that a license to operate a board and care home states basic information necessary to identify the home and its licensee.[1]

1. This provision is adapted from N.D. Cent. Code §25-16-05 (Supp. 1981) and Okla. Stat. tit. 63, § 1-1905 (Supp. 1981-1982).

Section 17.5. Posting of License and Availability of Inspection Reports for Public Inspection.

(A) A board and care home shall post conspicuously in an area of the home accessible to the residents, staff, and visitors:

(1) its license to operate; and

(2) a notice that a copy of each inspection report received by the home from the agency for the past three (3) years is available for public inspection.

(B) A board and care home shall retain for public inspection a complete copy of each inspection report received by the home from the agency for the past three (3) years.

COMMENT

Section 17.5 is adapted from Michigan's adult foster care facility licensing law.[1] Posting of a license to operate a board and care home serves as notice to the public that the home is licensed. Of the seventy (70) state board and care licensing statutes that require a license, twenty (20) require that the license be posted conspicuously in the facility.[2] The availability of past inspection reports for examination by residents and visitors enables these persons to get a detailed picture of the compliance history of the home.[3]

1. Mich. Comp. Laws Ann. § 400.727 (Supp. 1982).
2. *See State Laws and Programs Serving Elderly Persons and Disabled*

Adults, 7 Mental Disability L. Rep. 158, 181-188 (1983).

3. Other state laws requiring that inspection reports be made available to the public include Cal. Health & Safety Code § 1520 (West 1979 & Supp. 1981); Ill. Stat. Ann. ch. 111½, §§ 4153-209 to 210 (Smith-Hurd Supp. 1982-1983); Kan. Stat. Ann. § 39-935 (1981); N.Y. Soc. Serv. Law § 461e (McKinney Supp. 1981-1982).

Section 17.6. Annual Renewal of a License.

(A) A license shall be valid for one (1) year.

(B) At least ninety (90) days prior to expiration of the license, the licensee shall submit an application for renewal of a license.

(C) The agency shall have the authority to investigate any information included in the application for renewal of a license.

(D) The agency shall conduct an inspection of the applicant home at least sixty (60) days prior to expiration of the license as provided in section 20.

(E) If the agency finds that the applicant home is not in compliance with this Act, it shall require the home to correct any violations and submit a report of compliance as provided in section 22.

(F) If the agency finds that the applicant home is in compliance with this Act, the agency shall renew the license of the home.

COMMENT

Most state board and care licensing laws provide that a license is valid only for one (1) year and that the licensee must file a renewal application on an annual basis in order to remain lawfully licensed, although some statutes allow a two (2)-year duration period.[1] The purpose of requiring annual renewal of a license is to provide an additional mechanism for monitoring a home's compliance with the model act. It authorizes the agency to investigate the continuing capability of the licensee to operate a board and care home.

The act requires one annual inspection of every board and care home. This inspection must occur at least sixty (60) days before expiration of the license. By providing for a two-month period between the agency's inspection and expiration of the applicant home's license there is sufficient time to correct violations which may be found and thus to ensure compliance with the act before renewal of the home's license.

1. *See, e.g.*, Idaho Code § 39-3303 (1977 & Supp. 1982); Neb. Rev. Stat. § 71-2021 (1981 & Supp. 1982); N.J. Stat. Ann. § 55:13B-7(b) (West Supp. 1982); Pa. Stat. Ann. tit. 62, § 1009 (Purdon 1968). Michigan and Oregon allow a two-year period. Mich. Comp. Laws Ann. §400.719 (Supp. 1982); Or. Rev. Stat. § 443.425 (1981).

Section 17.7. Non-Transferability of License.

A license shall be issued only for the premises, persons, or organizations named in an application for a license and shall not be transferable or assignable.

COMMENT

This provision, which is contained in most licensing laws, is intended to ensure that a home is operated only by the individual or organization approved by the agency to operate a board and care home.[1]

1. *See, e.g.*, Or. Rev. Stat. § 443.430 (1981); Pa. Stat. Ann. tit. 62, § 1009 (Purdon 1968 & Supp. 1982); S.C. Code Ann. § 44-21-530 (Law Co-op. 1976); Utah Code Ann. § 26-21-8(2) (Supp. 1981).

Section 17.8. Transfer of Ownership.

(A) Whenever ownership of a board and care home is to be transferred from the person named in the license to any other person, the transferee must obtain a new license as provided in sections 17.2 to 17.4.

(B) The transferee shall notify the agency of the intended transfer and file an application for a license as provided in section 17.2 at least thirty (30) days prior to the final transfer.

(C) The transferor shall notify the agency of the intended transfer at least thirty (30) days prior to the final transfer. The transferor shall remain responsible for the operation of the home until the date a new license is issued to the transferee.

(D) The parties to the sale shall meet with the agency at least thirty (30) days prior to the final transfer to obtain a determination of the items of noncompliance with this Act. Each item of noncompliance shall be corrected as a condition of issuance of a license to the transferee.

(E) The transferor shall remain liable for all penalties assessed against the home as provided in section 25 for violations occurring prior to the transfer of ownership.

COMMENT

This section is adapted from the board and care licensing laws of Illinois, Wisconsin, and Michigan.[1] Because a license issued under the model act is not transferable, a person seeking to purchase an operating board and care home must obtain a new license. Section 17.8 is intended to address the unique circumstances of such a transaction. Providing the agency with advance notice of the sale and authorizing its participation in the transaction ensure that the new owner will be suitable to operate a board and care home and that the home will be brought into compliance with the act before issuance of the new license. Subsections (C) and (E) clarify the transferor's liability by providing that the transferor is fully responsible for the operation of the home until the new license is issued and remains responsible for penalties assessed against the home prior to the transfer of ownership.

1. Ill. Ann. Stat. ch. 111½, §§ 4153-112 to -114 (Smith-Hurd Supp. 1982-1983); Mich. Comp. Laws Ann. § 400.713(7) (Supp. 1982); Wis. Stat. Ann. § 50.03(13) (West Supp. 1982).

Section 17.9. Notice to Agency of Change of Address and Intent to Close.

(A) A licensee shall provide written notice to the agency of a change of address at least fourteen (14) days prior to the date of the change of address.

(B) A licensee shall provide written notice to the agency of its intent to voluntarily close a board and care home at least sixty (60) days prior to the date of closure of the home.

(C) The agency shall begin to provide the residents of the home that is closing with transfer assistance as provided in section 27 upon receipt of the notice provided in subsection (B).

COMMENT

A current mailing address for a licensee of a board and care home is essential agency information. Under the model act a licensee must receive notice of all administrative actions regarding its board and care home. Subsection (A) of section 17.9 ensures that the licensee will receive the required notice by giving the licensee the responsibility to provide advance notice in writing of any change of address.

Voluntary closure of a board and care home necessitates transfer of its residents. The agency's responsibilities regarding transfer of board and care home residents require a significant period of time. The agency must locate alternative placements for each resident and provide residents with assistance in adjusting to their planned transfer. For this reason, the model act requires that a licensee who is voluntarily closing a board and care home give the agency sixty (60) days notice of its planned closure.

Section 17.10. Regulations.

The agency shall promulgate regulations relating to licensing in the following areas:

(A) license application fees;

(B) license application forms and procedures;

(C) license applicant investigation procedures;

(D) license issuance procedures;

(E) license renewal forms and procedures;

(F) transfer of ownership procedures; and

(G) any other regulations necessary to carry out the requirements of this section.

COMMENT

No comment necessary.

SECTION 18. UNLICENSED BOARD AND CARE HOMES.

Section 18.1. Procedures for Identification.

The agency shall promulgate regulations governing the identification of unlicensed board and care homes in cooperation with the board and care council as provided in section 16.2.

COMMENT

According to a number of studies, a significant number of board and care homes are operating without a proper license.[1] Several explanations for this high incidence of unregulated board and care homes have been offered. First, in states without a Supplemental Security Income (SSI) supplement for residents of licensed board and care homes, there is little incentive to obtain a license.[2] In addition, an unknown number of board and care homes and nursing homes that have had their license revoked continue to operate as boarding homes serving essentially the same clients.[3] Finally, the large number and architectural inconspicuousness of board and care homes make it difficult for them to be identified by state licensing agencies.[4]

Although a successful board and care home licensing program should reach all such homes in a state, experience shows that meeting this standard is a major problem for many state licensing agencies.[5] The model act responds to this problem by requiring that the agency develop regulations governing procedures for identification of unlicensed board and care homes and mandating that this effort be undertaken jointly with the board and care council. The council's interdisciplinary and interagency representatives will allow it to make a major contribution to the development of procedures for identification of unlicensed homes and the sharing of information among the various state agencies that come into contact with unlicensed homes.[6]

The model act does not specify the identification mechanisms to be used by each state, but instead allows the state agency to use the mechanisms that are most appropriate based upon its resources, the contributions of other organizations and agencies that come into contact with unlicensed homes, and the estimated size of the problem in the particular state.

The Social Security Administration provides state data exchange (SDX) tapes to states upon request. These tapes, which list SSI recipients by address, enable a state to identify residences where three (3) or more SSI recipients are living.[7] These residences then can be compared with addresses of licensed homes to develop a list of suspected unlicensed homes that should be investigated.[8]

Cooperation, whereby the state board and care licensing agency and the state or local agency responsible for oversight of boarding homes communicate with each other or conduct joint inspections, also can have positive results.[9] These cooperative efforts can be used in conjunction with several other mechanisms for identifying

unlicensed homes. A number of examples follow. Licensing agencies or long term care ombudsmen can check newspapers and the Yellow Pages for persons advertising room and board services. Nursing homes and board and care homes that have been delicensed can be investigated. In several states, long term care ombudsmen and state licensing agencies have engaged in cooperative efforts to identify unlicensed homes.[10] Community education regarding licensing requirements also can result in reports of suspected unlicensed homes to the agency by concerned citizens. Each state should adopt those mechanisms for its identification efforts that are most workable and effective.

1. A nationwide survey of board and care homes found that one-sixth of the homes in the United States were unlicensed. K. Reichstein & L. Bergofsky, *Summary and Report of the National Survey of State Administered Domiciliary Care Programs in the Fifty States and the District of Columbia* 50 (Horizon House Institute, Philadelphia, Pa., 1980). A 1979 General Accounting Office study of board and care homes in Baltimore, Maryland, and Camden County, New Jersey, surveyed thirty-eight homes; nine were operating without a required license. Comptroller General's Report to Congress, *Identifying Boarding Homes Housing the Needy Aged, Blind and Disabled: A Major Step Toward Resolving a National Problem* 7 (General Accounting Office HRD 80-17.Nov. 19, 1979).
2. 2 N. Dittmar, G. Smith, J. Bell, C. Jones, & D. Manzanares, *Board and Care for Elderly and Mentally Disabled Populations* 6-35 (Denver Research Institute 1983).
3. *Id.* at 1-29. Office of Program Development, Administration on Aging, *Executive Summary: The Long Term Care Ombudsman Program, National Summary of State Ombudsman Reports for FY 81* (Oct. 1982).
4. C. Harmon, *Board and Care: An Old Problem, A New Resource for Long Term Care* 17 (Center for the Study of Social Policy, Washington, D.C., June 30, 1982).
5. *Id.* at 9.
6. *See* section 16.3 & comment, *supra.*
7. Comptroller General's Report to Congress, *supra* note 1, at 6.
8. Maryland's "Project Identification" uses SDX tapes to identify unlicensed homes. SDX tapes are combined with lists of homes from state and local welfare departments and the Veteran's Administration to yield a list of unlicensed residences. Local welfare and public health department staff and state licensing workers investigate the suspected homes in teams. Once a home is identified, the state requests that it obtain a license. Harmon, *supra* note 3, at 21-22. Rhode Island's Department of Health also used the SDX tapes when implementing its new sheltered care facilities licensing law in 1982. Telephone interview with Robert Dicenso, Chief, Division of Facilities Regulation, Rhode Island Department of Health (June, 1983).
9. In a small number of states boarding homes are licensed at the state level. *See, e.g.,* Neb. Rev. Stat. §§ 71-5901 *et seq.* (1981); N.J. Stat. Ann. §§ 55:13B-1 *et seq.* (West Supp. 1982); and N.D. Cent. Code §§ 23-09-01 *et seq.* (1981). In these states, cooperation among the two agencies may be more easily accomplished. For example, North Dakota's boarding home for the aged and infirm legislation provides for joint inspections by two state agencies. It requires joint inspections by the Department of Human Services and the Laboratories Department, which licenses boarding houses, when a licensed boardinghouse is suspected of providing personal care services, or when a home for the aged and infirm becomes a boardinghouse. N.D. Cent. Code § 50-18-02.1 (1981). These inspections have been successful in limiting the number of unlicensed board and care homes in North Dakota. Telephone interview with Richard Myatt, North Dakota Dept. of Human Services (May 26, 1983). In states that do not license boarding homes, county or municipal fire, health, or buildings departments are generally responsible for periodic inspection of boarding homes. An example of a joint effort in a state which does not license boarding homes is Maryland's "Project Identification."
10. *See* Office of Program Development, *supra* note 3, at 82-83.

Section 18.2. Prohibition on Placement into Unlicensed Homes and Reporting Requirements.

(A) No service coordinator or other public agency employee shall place, refer, or recommend placement of a person into a board and care home that is operating without a license.

(B) Any service coordinator or other public agency employee who knows or should know that a board and care home is operating without a license shall report the name and address of the home to the agency. Any service coordinator or other public agency or employee who fails to comply with this subsection shall be subject to a criminal penalty as provided in section 38.1

(C) The agency shall investigate any report filed under subsection (B). If the agency has probable cause to believe that a board and care home is operating without a license, it shall conduct an inspection as provided in section 20.

COMMENT

The model act prohibits placement or referral of individuals into unlicensed board and care homes for two important reasons.[1] First, it is contrary to the purposes of the model act to place elderly and disabled persons into unlicensed board and care homes. Second, this prohibition severely limits the opportunities for an unlicensed home to draw in new residents, which creates an incentive for homes to be licensed.

Subsection (B) supplements agency efforts to identify unlicensed homes. Public or private agencies involved in board and care home placement often come into contact with unlicensed homes when seeking appropriate placements for their clients. Some states already have recognized the importance of this information and require it to be reported to the licensing agency.[2] The act goes further by stating that once the information is received, the agency must investigate the report and may inspect the home under section 20. Compliance with the reporting requirements is assured by making failure to file a required report a misdemeanor.

Once an unlicensed home has been identified, the licensing and enforcement provisions of the model act take effect. The home can either comply with the requirements of the act and apply for a license, or the agency can use enforcement sanctions, such as suspension of admissions, transfer of residents, injunctive relief, receiverships or criminal penalties, to force the home to cease operation, and provide for safe transfer of the residents to alternative placements.

1. This provision is adapted from Ohio Rev. Code Ann. § 3721.06 (Page Supp. 1981).
2. New York state requires any professional who discovers an unlicensed home to report the finding to the licensing agency. Telephone interview with Chip Bradley, New York State Office for Aging (June, 1983).

SECTION 19. VARIANCE.

The model act provides broad, but specific, guidelines and encourages the agency to implement these guidelines with greater particularity by promulgating regulations. Because of the difficulty of adopting general rules to apply to the particular circumstances encountered by individual homes, the model act permits a licensee to seek a variance from the requirements of the act. In other words, a licensee, upon a sufficient showing, may be permitted to meet the requirements of the act by a method different from that required by a specific regulation or provision of the act.

The model act provides for two kinds of variances: temporary and permanent. A temporary variance permits a licensee an extended, but definite, period of time to meet the strict requirements of the act so long as he or she has an acceptable plan for bringing the home into compliance and sufficiently protects the residents during the period of the temporary variance. A permanent variance permits the licensee to meet the requirements of the act by using a method of compliance that meets the same goals as the regulation or provision of the act and protects the residents as well as strict compliance with the act's requirements would protect them.

Although there are distinctions between temporary and permanent variances under the model act, the policy arguments in favor of the use of variances are applicable to both. One commentator refers generally to the policy arguments in favor of variances as administrative equity.[1] No statutory scheme can provide adequately for all the situations that may arise. To require all homes to adhere absolutely to the standards of the model act would result in hardship to many homes. However, a balance must be struck between the equity principles that allow administrative agencies to make determinations on a case-by-case basis and the possibility that the legislative purpose of the act may be swallowed by administratively created exceptions.

The danger that variances may thwart legislation, in part, arises when variance procedures deviate totally from an adversarial system.[2] The informal nature of some administrative procedures could lead to control by the licensee of the process for obtaining a variance. One solution to this problem is to devise a mechanism for obtaining information from those persons, other than the licensee and the agency, who may be adversely affected by granting the variance.[3] The model act provides for such a mechanism by allowing residents to air their views on the granting or denying of a variance. In addition, the burden of proving the need and the right to a variance is on the licensee.

An additional component that could be added to the procedures for obtaining a variance is to require the licensee to post a performance bond or other security in an amount equal to the reasonable cost of the work required to bring the licensee into compliance with the act.[4] This additional procedure, which is not included in the model act, could enhance the use of the variance procedures as an enforcement tool.

1. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules,* 1982 Duke L.J. 277.
2. Currie, *Enforcement Under the Illinois Pollution Law,* 70 Nw. U.L. Rev. 389, 469 (1975).
3. *Id.*
4. *Id.*

Section 19.1. Temporary Variance. Application.

(A) A licensee of a board and care home may apply to the agency for a temporary variance from a regulation or provision of this Act.

(B) The application for a temporary variance shall state the following:

(1) the regulation or provision of the Act from which the temporary variance is sought and a description of the way in which the home is not in compliance with that regulation or provision;

(2) the reasons why the variance is needed;

(3) the period of time for which the variance is requested;

(4) the licensee's plan for bringing the home into compliance prior to the expiration of the temporary variance;

(5) the licensee's methods for sufficiently safeguarding the residents against the dangers covered by the regulation or provision of the Act during the period of the temporary variance; and

(6) the licensee's assurance that the conditions in the home do not present an imminent danger.

COMMENT

Under the model act, the temporary variance is the sole means by which a licensee may obtain additional time to correct violations. The goal of the temporary variance is to allow a licensee to seek additional time to come into compliance if the licensee demonstrates that: (1) the home cannot with reasonable diligence be brought into compliance within the time period required by the agency; and (2) the licensee's alternative method of compliance during the period of the temporary variance will provide sufficient protection for the residents.

The licensee is required to provide the detailed information in the application as provided in this section for several reasons. First, it is a way to ensure that the agen-

cy has sufficient information upon which to begin investigating the request for a variance. Second, as provided in section 19.2, residents are permitted to comment on the application for a temporary variance. This opportunity to comment is meaningful only if there is sufficient information provided in the application. Finally, as one commentator observes, a thorough description in the application of the need for a variance is another method to prevent licensees from controlling the process for obtaining a variance.[1]

1. Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 412 (1975).

Section 19.2. Temporary Variance. Notice to Residents.

(A) Upon filing of the application for a temporary variance, the agency shall notify each resident of the home of the licensee's application.

(B) A copy of the application shall be attached to the notice to each resident, and the notice shall state the following:

(1) the right of each resident to comment in writing on the licensee's application for a temporary variance and on whether the licensee's application for a temporary variance should be granted or denied; and

(2) the date by which written comments on the application must be received.

(C) The agency shall serve the notice on each resident personally or by certified mail within five (5) days of the receipt by the agency of the licensee's application for a temporary variance.

(D) The agency shall consider the written comments received as provided in this section in determining whether the licensee's application for a temporary variance shall be granted or denied.

COMMENT

This section provides residents of the home for which a variance is sought with the right to comment on the licensee's application for a variance. As discussed in the introduction, devising a mechanism to insure that the opinions of those persons adversely affected by the variance will be heard is crucial to avoid the possibility that the licensee could control the process for obtaining a variance. Although the agency certainly has an interest in whether the licensee's request for a variance is granted or denied, in most cases it will not be adversely affected by that decision. The residents on the other hand, will be adversely affected and so their ideas and information must be received by the agency in order to ensure a fair determination.

Most state administrative procedure acts (APAs) are based on the 1961 revision of the model state administrative procedure act which defines party as " . . . each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."[1] The model act expands upon the state APAs by according the right to be heard in the administrative procedures for granting or denying a variance.

1. Revised Model State Administrative Procedure Act, (National Conference of Commissioners on Uniform State Laws) §1(5)(1961). The more recent 1981 version of the model state APA defines party as:

(i) a person to whom the agency action is specifically directed; or

(ii) a person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceedings.

Id. at §1-102(6)(1981).

Section 19.3. Temporary Variance. Authority of Agency to Investigate, Inspect, or Schedule Conference.

In determining whether the licensee's application for a temporary variance shall be granted or denied, the agency shall take one or more of the following actions:

(A) investigate the statements in the application;

(B) inspect the premises of the board and care home; or

(C) schedule a conference with the licensee regarding the application.

COMMENT

Unlike the procedures for obtaining a permanent variance, which require the agency to hold a hearing, the procedures for obtaining a temporary variance allow the agency to choose one or more informal methods for determining the merits of the licensee's application. The application submitted by the licensee should provide sufficient information for the agency to begin its review. It may only need to corroborate the licensee's statements in the application through an investigation, or it may be necessary to inspect the home to determine whether the residents will be sufficiently protected if the temporary variance is granted. If additional information is needed from the licensee, the agency can schedule a conference to obtain that information. Through investigation, inspection, and conferences, and with the additional comments received from residents and staff pursuant to section 19.2, the agency should be able to obtain all the information necessary to determine whether the licensee's application should be granted or denied.

Section 19.4. Temporary Variance. Grant or Denial.

(A) The agency shall grant a temporary variance upon a determination that:

(1) strict compliance with the regulation or provision of the Act cannot with reasonable diligence be accomplished within:

(a) the time limit stated in the notice of viola-

tion served upon the licensee; or

(b) if a notice of violation has not been served upon the licensee, within a reasonable time.

(c) In determining whether strict compliance with the regulation or provision of this Act cannot with reasonable diligence be accomplished within the time limits as provided in paragraph (a) or a reasonable time as provided in paragraph (b), the agency shall consider whether the licensee is unable to comply with the regulation or provision of the Act because of any of the following factors:

(i) the unavailability of professional or technical personnel;

(ii) the unavailability of materials and equipment needed to come into compliance with the regulation or provision; or

(iii) the inability to complete necessary construction or alteration of facilities before the time limit as provided in paragraphs (1)(a) and (1)(b).

(2) the licensee has an effective plan for bringing the home into compliance with the regulation or provision of the Act as quickly as is practicable; and

(3) the licensee's plan for bringing the home into compliance during the period of the temporary variance sufficiently safeguards the residents against the danger covered by the regulation or provision, and the conditions in the home do not present an imminent danger.

(B) The duration of the temporary variance shall not exceed the reasonable time necessary to accomplish the licensee's plan for coming into compliance with the Act. The agency may grant one extension of time for the temporary variance upon a showing by the licensee that unforeseen circumstances have arisen since the granting of the variance and have delayed completion of the licensee's plan for coming into compliance with the Act.

(C) The order granting or denying the temporary variance shall be in writing and shall state the agency's decision, and the findings in support for that decision. If the temporary variance is granted, the order shall state the expiration date of the temporary variance, and the steps the licensee must take to bring the home into compliance and protect the residents during the pendency of the order.

(D) The licensee shall be served personally or by certified mail with a copy of the order and opinion, and with written notice of the licensee's right to contest the order as provided in section 19.5. Notice of the agency's order granting or denying the temporary variance shall be given to each resident of the home.

(E) A licensee who fails to comply with an order granting a temporary variance shall be subject to the procedures and sanctions for failure to comply with the Act.

COMMENT

As discussed previously, the purpose of a temporary variance is to allow certain licensees some additional time to correct a violation when circumstances prohibit a timely correction of that violation. Circumstances which could prevent a licensee from correcting a violation within the time limit are the unavailability of labor, materials, or equipment or the inability to make the corrections, even if labor, materials, and equipment are available, within the time limit. Labor, materials, and equipment may be unavailable to the licensee, not only because they are in short supply but also because the licensee cannot obtain financing to purchase them. At a minimum, the licensee must have exercised reasonable diligence to attempt to come into compliance before he or she can qualify for a temporary variance.

Merely showing that he or she, even with the exercise of due diligence, cannot correct the violation before the expiration of the time limit is not sufficient for the licensee to obtain a variance. The licensee must also demonstrate that he or she has an effective plan for bringing the home into compliance, and that the plan sufficiently protects the residents from the dangers resulting from the failure to correct the violation. Finally, the violation must not be one that presents an imminent danger, as that phrase is defined in section 3, or, if it is, the conditions that present an imminent danger must be abated even if the violation causing the conditions is not fully corrected.

A temporary variance is not intended to be a preliminary step toward obtaining a permanent variance. Rather, a temporary variance and a permanent variance under the model act are designed to meet two distinct goals. A temporary variance is intended to give the licensee flexibility in time and method to correct a violation that can be corrected, with additional time, without undue hardship to the licensee. A permanent variance, on the other hand, is meant to allow a licensee to use an alternative method of compliance other than the one specifically required by the act when strict compliance with the act would unfairly burden the licensee. The reasons why a licensee is unable to correct a particular violation may meet the requirements for a temporary variance because the licensee can demonstrate that he or she cannot with due diligence bring the home into compliance within a certain period of time. Those same reasons may not qualify a licensee to obtain a permanent variance because the correction would not impose a substantial burden on the licensee if he or she is given a slightly longer period to comply.

If the agency grants a temporary variance, the order must state the steps the licensee must take to bring the home into compliance and to protect the residents during the pendency of that order. Then, if the licensee fails to take one of these steps, either toward compliance or to

protect the residents, the agency can rescind the order. After the order is rescinded, the licensee must comply with the act within the time limit stated in the order. Through these procedures, the agency can enforce the licensee's adherence to the requirements of the order for a temporary variance.

One commentator states that one method to encourage accountability of the licensee and to strengthen the agency's control of the procedures for obtaining a variance is to impose conditions upon a temporary variance and to give the agency a mechanism for enforcing those conditions. This mechanism is accomplished in the model act through the combined working of subsections (C) and (E).[1]

1. Currie, *Enforcement Under the Illinois Pollution Law,* 70 Nw. U.L. Rev. 389, 471 (1975).

Section 19.5. Right to Contest Denial of a Temporary Variance.

(A) A licensee shall have the right to contest denial of his or her application for a temporary variance in accordance with the adjudication procedures as provided in section 6.

(B) If a licensee intends to contest denial of his or her application for a temporary variance, the licensee shall request a hearing in writing within ten (10) days after receipt of notice of the denial.

(C) Upon written request of the licensee, the agency may stay the date by which the violation must be corrected as specified in the notice of violation until a final decision is reached regarding denial of an application for a temporary variance.

COMMENT

The model act extends the licensee's right to contest adverse agency actions to denial of an application for variance because of the significant hardship that an erroneous or arbitrary denial of a variance can have upon a licensee.[1]

1. *See* section 24.2 and comment *infra* for the reasons behind creation of this statutory right.

Section 19.6. Application for Variance After Receipt of Notice of Violation.

(A) If a licensee has received a notice of violation, as provided in section 22.1, the licensee may apply for a variance from any regulation or provision of this Act that is specified in the notice of violation.

(B) If a licensee applies for a variance as provided in subsection (A), the licensee may request, in writing, an order to stay the date by which the violations must be corrected as specified in the notice of violation. The agency may stay the date by which violations must be corrected until review of the licensee's application for a variance is completed only upon a showing by the licensee that any conditions in the home that present an imminent danger have been abated.

COMMENT

This section permits a licensee to apply for a variance even after it has been notified that it is in violation of the act. Upon the written request of the licensee, the agency may stay the time for correction stated in the notice of violation. If the stay is granted, but the variance subsequently is denied, the licensee will have whatever time remains of the time period contained in the notice of violation at the time the stay was granted.

A licensee need not wait until after an inspection and notice of violation to apply for a variance. In fact, waiting for the receipt of the notice of violation could be risky since the agency is not required to stay the time limit pending the review of the application for a variance. Regardless of the merit of the licensee's application for a variance, the home could have a sanction imposed against it for failure to comply with the act if the time limit stated in the notice of violation expires, the review of the application has not been completed, and the agency refuses to stay the time limit pending that review. Although the result may seem harsh, the licensee can always avoid imposition of a sanction by complying with the strict requirements of the act. Further, this encourages licensees to understand the requirements of the act and to monitor their own compliance with those requirements, so that they can apply for a variance as soon as a violation arises and not wait until after an inspection.

Section 19.7. Permanent Variance. Application.

(A) A licensee of a board and care home may apply to the agency for a permanent variance from a regulation or provision of this Act.

(B) The applicant for a permanent variance shall state:

(1) the specific regulation or provision of the Act from which the variance is sought;

(2) a description of the way in which the home is not in compliance with the Act;

(3) the reasons why strict compliance with the regulation or provision of the Act would impose a substantial hardship on the licensee because of economic, technological, legal, or medical considerations; and

(4) the alternative method the licensee will use to meet the requirements of the Act, and the way in which the licensee's alternative method:

(a) meets the same goal as the specific regulation or provision from which the variance is sought is designed to meet; and

(b) protects the health, safety, and welfare of the residents as well as they would be protected if strict compliance with the regulation or provision of the Act was required.

COMMENT

As with the application for a temporary variance, the licensee is required to list detailed information in his or her application for a permanent variance. The information requested in the application is a reiteration of the standards for granting or denying a variance as provided in section 19.10, and these standards are discussed in more detail in the comment to that section.

The procedures for obtaining a permanent variance do not provide an opportunity for residents to comment in writing on the application as in the procedures for obtaining a temporary variance. However, the application must be sent to residents to give them the opportunity to understand the nature of the licensee's request for a permanent variance prior to the hearing as provided in section 19.9. Requiring detailed information in the application also assists the agency in fully understanding the licensee's need for a permanent variance.

Section 19.8. Permanent Variance. Notice to Residents.

(A) Upon filing of the application for a permanent variance, the agency shall notify each resident of the home of the licensee's application.

(B) A copy of the application shall be attached to the notice to each resident and the notice shall state the following:

(1) the time and place for a hearing as provided in section 19.9; and

(2) the right of each resident to testify or present evidence at the hearing.

(C) The agency shall serve the notice on each resident personally or by certified mail within five (5) days of the receipt by the agency of the licensee's application for a variance or within fourteen (14) days of the hearing, whichever is earlier.

COMMENT

The purpose of this section is to notify the residents of the home of the content of the application and the date of the hearing on the application in order to give them a meaningful opportunity to be heard at the hearing. As discussed in the comment to section 19.2, because residents are the persons most directly affected by the proposed variance, their involvement in the review process is important to ensure a fair and just determination on the application by the agency.

Section 19.9. Permanent Variance. Mandatory Hearing.

(A) The agency shall hold a hearing on the application for a permanent variance within forty-five (45) days of the filing of the application.

(B) The hearing, including notice requirements, shall be conducted as provided in section 6; except that each resident of the home shall have the right to testify and present evidence at the hearing.

(C) The licensee shall have the burden of proving at the hearing that it meets the requirements for granting a permanent variance as provided in section 19.10(A).

(D) Prior to the hearing, the agency may inspect the premises of the home seeking the permanent variance and the findings of the inspection may be presented at the hearing.

COMMENT

This section mandates that the agency hold a hearing on each application for a permanent variance. This more formal procedure is required for granting or denying a permanent variance because it will be an exception to strict compliance with the act which, once approved, may continue for an indefinite period of time. A permanent variance should not be granted until all affected parties, the residents, staff, and the licensee, have had an opportunity to be heard on the question of whether the variance should be granted.

Section 19.10. Permanent Variance. Grant or Denial. Notice. Effect of Order.

(A) The agency shall grant a permanent variance upon a determination that:

(1) strict compliance with the regulation or statutory provision of the Act would impose a substantial hardship on the licensee because of economic, technological, legal, or medical considerations;

(2) the licensee's alternative method of compliance with the Act will meet the same goal that the regulation or provision of the Act from which the licensee seeks the variance was designed to meet; and

(3) the licensee's alternative method for compliance with the Act protects the health, safety, and welfare of the residents as well as they would be protected if strict compliance with the Act was required.

(B) The order to grant or deny a variance shall be in writing and shall be accompanied by a written opinion that states the findings of facts and conclusion of law upon which the decision was based. In granting the variance, the agency may impose any conditions upon the variance it determines are necessary to meet the policies of the Act, and any conditions imposed shall be stated in the decision granting the variance.

(C) The licensee shall be served personally or by certified

mail with a copy of the order and opinion, and with written notice of the licensee's right to contest the order as provided in section 19.11. Notice of the decision and opinion shall be given to all interested parties.

(D) A licensee who fails to comply with an order granting a permanent variance shall be subject to the procedures and sanctions for failure to comply with the Act.

COMMENT

Under the model act, the agency must make three separate determinations before it can grant a permanent variance. First, it must determine whether compliance would impose a substantial hardship on the licensee in at least one of the following areas: (1) economic hardship; (2) technological hardship; (3) legal hardship; or (4) medical hardship.[1] In order to demonstrate an economic hardship, the licensee must show that compliance with the act will impose such a severe financial burden that the home will not be able to continue operating.[2] A technological hardship is demonstrated by showing that compliance is beyond the technological capability of the home.[3] Showing that compliance with the act would require the licensee to violate the regulations or provisions of another statute would be sufficient to demonstrate a legal hardship.[4] And, finally, a medical hardship is demonstrated by showing that compliance would seriously and detrimentally affect the licensee's health.[5]

But merely showing that correction would impose a substantial hardship on the licensee is not sufficient to permit the agency to grant a permanent variance. Unless the licensee can develop an alternative means of compliance that meets the same goal and protects the residents as well as the specific regulation or provision from which the licensee seeks a variance, the application should be denied. In other words, the licensee must demonstrate not only that he or she has sufficient reasons for not complying strictly with the act, but also that an alternative method of compliance exists that serves the purposes of the act while at the same time protecting the residents.

1. This standard was adapted from Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules,* 1982 Duke L.J. 277, 293-322.
2. *Id.* at 294.
3. *Id.* at 298.
4. *Id.* at 300.
5. *Id.* at 301.

Section 19.11. Right to Judicial Review Following Denial of Application for a Permanent Variance.

A licensee shall have the right to file a petition for judicial review of an agency determination denying an application for a permanent variance in accordance with the judicial review procedures as provided in section 6.

COMMENT

This section of the model act extends the licensee's right to contest adverse agency actions to denial of an application for a permanent variance. Under most state administrative procedure act adjudication provisions, a licensee aggrieved by a final decision of the agency is entitled to judicial review. The model act provides for the licensee's right to judicial review following the agency's determination on the application for a permanent variance because the agency will have reached its determination after a full administrative hearing as provided in section 19.9. At the hearing, the licensee will have had an opportunity to present written evidence and testimony relating to the validity of the application, thereby eliminating the need for the administrative hearing that is normally provided to licensees contesting agency actions.

Section 19.12. Exceptions.

(A) No variance shall be granted from a regulation or provision of the Act pertaining to licensing, as provided in sections 17.1 - 17.10, inspections, as provided in sections 20.1 - 20.6, resident rights, as provided in sections 10.1 - 10.18, or the posting and public inspection of licensing documents, as provided in section 17.5.

(B) No medium or large home shall be granted a permanent variance from regulations or provisions of the Act pertaining to fire safety, as provided in section 12.4.

COMMENT

There are four sections of the model act listed in subsection (A) with which, as a matter of policy, a home should always be in strict compliance. Strict compliance with the sections on licensing and inspections ensure that the procedures for obtaining a license, and for monitoring and enforcement, are applied fairly and work effectively. Resident rights are excepted from variances because it would be unfair to permit the agency to vary a right that belongs to residents of the home. And, finally, variances should not be granted for posting and public inspection of documents because these sections do not unduly burden the home, and the information on the home's history of compliance with the act is important to consumers. Neither a temporary nor a permanent variance is permitted of the sections listed in subsection (A).

No permanent variances from fire safety regulations are permitted for medium to large homes. This subsection leaves open the possibility that a small home could obtain a variance from fire safety regulations as long as the licensee meets the other requirements for obtaining a variance.

SECTION 20. INSPECTIONS AND INVESTIGATIONS.

Section 20.1. Mandatory and Discretionary Inspections.

(A) The agency shall conduct an inspection of a board and care home:

(1) prior to issuance of a license as provided in section 17.3;

(2) no later than sixty (60) days prior to annual renewal of a license as provided in section 17.6;

(3) within thirty (30) days after the date the agency receives a report of compliance or, if the agency does not receive a report of compliance, the date by which violations must be corrected as specified in the notice of violation as provided in section 22;

(4) within twenty-four (24) hours after the date by which violations that present an imminent danger must be corrected as specified in the notice of violation as provided in section 22.5;

(5) upon complaint, as provided in section 21; and

(6) anytime the agency has probable cause to believe a home has violated a regulation or provision of this Act.

(B) The agency may conduct inspection any time such inspections are authorized by this Act and any other time the agency considers it necessary to determine if a home is in compliance with this Act.

COMMENT

Inspections are an important mechanism available to the licensing agency for monitoring a board and care home's compliance with licensing requirements. Most board and care licensing statutes have provisions for routine or periodic inspections either once or twice a year[1]; statutes also often authorize the agency to make inspections any time to determine if a facility is in compliance with standards. Although nonroutine inspections are necessary in situations where the agency believes a home is in violation of the act, regular inspections provide the backbone for an effective licensing system.[2]

The importance of routine inspections to enforce comprehensive regulatory statutes for the protection of health and safety is underscored by U.S. Supreme Court decisions upholding warrantless inspections in certain pervasively regulated business situations.[3] Further, in adopting a lower probable cause standard for issuance of warrants for routine code enforcement inspections,[4] the Supreme Court stated that mandatory regular inspections are justified by the public's demand that dangerous conditions be prevented or eliminated and that no other canvassing technique would be as effective.[5] The Court also stated that area code enforcement inspections have a "long history of judicial and public acceptance."[6] For the above reasons, regular inspections of homes are mandated at specific times and an inspection of every licensed home is required once a year prior to renewal of the home's license.

In addition to routine inspections, the act requires nonroutine inspections based upon a complaint or probable cause to believe a home has violated the act, and permits discretionary inspections for situations that may not be covered by mandatory inspections. Both routine and nonroutine inspections also serve a preventive function. If licensees are aware that inspections will be made frequently, regularly, and at specific times, they should be less likely to allow conditions in the home to deteriorate. Indeed, the Supreme Court has noted the importance of frequent inspections in creating an effective deterrent where significant interests are at stake and are protected by a regulatory scheme.[7]

Moreover, regular and frequent inspections are critical to ensure the health, safety, and welfare of residents through the model act's standards. In a recent California nursing home case, the court stated that frequent (and unannounced) inspections:

> are crucial to the effective oversight of the physical well being of patients, to assure that they are not neglected or even abused. [Such]. . . inspections are also essential to effective protection of patients' financial welfare. Financial records can easily be concealed or even falsified. Patients are helpless to protect themselves.[8]

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1. *See States Laws and Programs Serving Elderly Persons and Disabled Adults,* 7 Mental Disability L. Rep. 158, 189-196 (1983). About half the licensing statutes mandate inspections. Some require a certain number of inspections, usually once or twice a year. Twice a year—*see, e.g.,* Mass. Ann. Laws ch. 111, § 72 (Michie/Law.Coop.1974 & Supp. 1982); Mo. Ann. Stat. § 198.022 (Vernon Supp. 1982); N.Y. Mental Hyg. Law § 31.07 (McKinney Supp. 1981-1982). Once a year—*see, e.g.*, Cal. Welf. & Inst. Code § 1534 (West 1979); Fla. Stat. Ann. § 400.428(3) (West Supp. 1982); Wash. Rev. Code Ann. § 18.20.110 (1978 & Supp. 1982). Some laws leave the number to the discretion of the agency. *See, e.g.*, Del. Code Ann. tit. 16, § 1105 (1975 & Supp. 1980); Minn. Stat. Ann. § 144.653 (West Supp. 1982-1983); Wyo. Stat. § 35-2-106 (1972 & Supp. 1982). Pre-license inspections also are required in some states. *See, e.g.*, Conn. Gen. Stat. Ann. § 19.578 (West 1977 & Supp. 1982); N.D. Cent. Code § 50-11-06.2 (1981); Ohio Rev. Code Ann. § 5123.19(c) (Page 1981).

2. In *Camara v. Municipal Court*, 387 U.S. 523, 537 (1966), which involved housing code violations in residential leased premises, the United States Supreme Court cited *Frank v. Maryland*, 359 U.S. 360, 372 (1959), in establishing a lower probable cause standard. Although *Frank* has been overruled and a warrant was required in *Camara*, a lower standard for issuing a warrant was based upon the following:

> Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search, or . . . to treat a specific problem, is of indispensable importance to the maintenance of community health. . . . The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials.

3. *See Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v.*

Biswell, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 71 (1970).

4. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); 387 U.S. 523.
5. 387 U.S. at 537.
6. *Id.*
7. 406 U.S. at 316.
8. *People v. Firstenberg*, 155 Cal. Rptr. 80, 86 (Cal. Ct. App. 1979); *See also Uzillia v. Commissioner of Health*, 367 N.Y.S.2d 795, 801 (Super. Ct. 1975), which stated that it is necessary for nursing homes to be open at all times to health department inspections designed and planned to "insure that the care and protections insured by law are actually being furnished." One commentator also has pointed to the need for frequent inspections of nursing homes. *See* Brown, *An Appraisal of the Nursing Home Enforcement Process*, 17 Ariz. L. Rev. 304, 328 (1975).

Section 20.2. Purpose, Scope, and Time of Inspections.

(A) The purpose of inspecting a board and care home shall be to determine whether the home is in compliance with regulations or provisions of this Act.

(B) An inspector shall have full access and authority to examine, among other things, a home's records, accounts, and physical premises, including the buildings, grounds, equipment, or any vehicles.

(C) An inspector shall have authority to interview the licensee, administrator, staff, and residents. Interviews with residents shall be confidential and conducted privately.

(D) Inspections may be conducted any time.

COMMENT

Most statutes provide general authorization for the agency to conduct inspections to determine compliance with statutory standards, although some list the substantive standards that are the subject of the inspection, such as resident rights, the financial conditions of the home, and others.[1] Because the model act has detailed standards governing various substantive areas, a general statement of the purpose of inspections to determine compliance with the act is sufficient.

Some statutes also set out the scope of inspections by stating what items or physical areas may be inspected.[2] The scope of inspections is detailed in the model act in order to provide operators with notice of what they may expect an inspector to examine in an inspection. Further, a regulatory statute's precise description of the purpose, scope, and frequency of inspections was cited in *Donovan v. Dewey* as a reason to support the constitutionality of warrantless inspections.[3]

This section, by authorizing inspectors to interview such persons, is intended to encourage inspectors to talk to residents as part of an inspection. Interviews with residents assure that different perspectives are obtained from those persons most able to provide information regarding how the home is operated.[4]

Inspections are permitted any day of the week and at any time of the day or night.[5] Since a board and care home is a daily twenty-four (24) hour operation, the agency should have authority to inspect a home at various times of its operation to obtain a complete picture of the care provided in a home. In particular, lack of adequate staff at night and lack of nutritional breakfasts are examples of violations that may be found in homes at night or at early hours when few visitors are present or expected.[6]

1. *See, e.g.*, N.Y. Soc. Serv. Law §§ 460(c)(2)(4) (McKinney Supp. 1981-1982). New York's residential care statute provides that the inspection may involve inquiry into whether the objectives of the facility are being met, the general management and financial condition of the facility, its methods of and equipment for scholastic and vocational education and for care and medical attention of residents.
2. *Id.*; Iowa Code Ann. § 135C.16 (1972 & West Supp. 1982-1983); Mich. Comp. Laws. Ann. § 400.712 (Supp. 1982); Or. Rev. Stat. § 443.435 (1981).
3. *Donovan v. Dewey*, 452 U.S. 594, 604 (1981).
4. Florida's nursing home statute requires that the annual inspection include private, informal conversations with residents and staff. Fla. Stat. Ann. § 400.022(3) (West Supp. 1981). *See* Commission on Legal Problems of the Elderly, American Bar Association, *Model Recommendations Intermediate Sanctions for Enforcement of Quality Care in Nursing Homes* 39 (1981).
5. One commentator has pointed to the need for night and weekend inspections of nursing homes. *See* Brown, *Nursing Home Enforcement*, 17 Ariz. L. Rev. 304, 328 (1975).
6. Advocacy groups have noted that these violations occur when inspections only are conducted during normal business hours.

Section 20.3. Subpoenas to Compel Attendance and Testimony of Witnesses and Production of Evidence and Oaths.

For the purpose of making investigations and inspections under this Act, the agency may:

(A) issue subpoenas for the attendance and testimony of witnesses and the production of evidence, including relevant papers, books, and documents, and;

(B) administer oaths.

COMMENT

This section provides authority for the agency to issue subpoenas for the testimony of persons and production of evidence and to administer oaths in order to assist the agency in carrying out its enforcement obligations under the act.

Subpoena power is necessary to assure that the agency can obtain all necessary information to determine if a home is in compliance with the act, particularly if the licensee or resident refuses to talk to an inspector or if the home does not allow the agency to examine its records. This provision is commonly found in regulatory statutes.[1] In addition to subpoenas for investigations, subpoenas in an administrative hearing may be issued under a state's APA, which is incorporated by reference into the model act by section 6. It should be noted, however, that the agency may not compel testimony or production of evidence or enforce its own subpoenas, but must obtain

judicial enforcement of a subpoena.

1. *See, e.g.*, 29 U.S.C. § 657(b) (1975) (Occupational Safety and Health Act); 30 U.S.C. § 813(d) (1971) (Coal Mine Health and Safety Act).

Section 20.4. Inspection Reports.

(A) Whenever an inspection is conducted, the agency shall prepare a written report that states the reasons for the inspection and summarizes all information obtained during the inspection.

(B) If the home is in violation of the Act, a copy of the inspection report shall be served upon the licensee at the same time as the notice of violation as provided in section 22.1. If the home is not in violation of the Act, a copy of the inspection report shall be mailed to the licensee within ten (10) days of the inspection of the home.

(C) All inspection reports shall be made available to the public at the agency during business hours.

COMMENT

This section requires inspection reports for every inspection, whether a home is found to be in compliance with the act or to have violated the act. New York's residential care facility licensing law has a similar requirement.[1] The purpose of the report is to provide written documentation of a home's ongoing compliance with licensing requirements for public examination.

1. N.Y. Soc. Serv. Law § 461-a(2)(c) (McKinney Supp. 1981-1982) provides "[a]n inspection report shall be made of each inspection which shall clearly identify and indicate in detail each area of operation, . . . and whether each such an area of operation or any of its component parts is or is not in compliance with the regulations. . . ."

Section 20.5 Advance Notice, Consent, and Search Warrants to Inspect.

(A) The agency has authority to conduct inspections as provided in subsection 20.1(A) with or without advance notice to the licensee, administrator, staff or a resident of the home; except that the agency shall not give advance notice of any inspection if the agency believes that notice might obstruct or seriously diminish the effectiveness of the inspection or enforcement of the Act.

(B) An inspection may be conducted pursuant to a search warrant or consent of the licensee; except that a warrant shall be obtained without first seeking the licensee's consent if advance notice has not been given because the agency believes that notice might obstruct or seriously diminish the effectiveness of the inspection or enforcement of the Act as provided in subsection (A) of this section.

(C) The inspector shall provide residents with a reasonable opportunity to remove personal effects from their bedrooms prior to conducting an inspection.

(D) Application, issuance, and execution of a search warrant to inspect a board and care home shall be in accordance with procedures provided by [state law].

COMMENT

Introduction

Under subsection (A) of this section, the agency may conduct inspections with or without advance notice to a home, although advance notice is absolutely prohibited if the agency believes the licensee may impede the inspection or the act's enforcement. Subsection (B) also authorizes the agency to carry out inspections either by consent or a search warrant. However, a search warrant must be obtained before seeking permission to inspect if the agency has not given a home advance notice for the reason specified in subsection (A).

Although only the licensee may consent to an inspection, residents' privacy is respected in subsection (C) by allowing them to remove personal items from their bedrooms before an inspection. Finally, subsection (D) refers to other state law regarding procedures for obtaining a warrant, since most states have statutory provisions governing administrative search warrants.[1] These procedures may include the lower probable cause standard established by the United States Supreme Court in *Camara v. Municipal Court* for issuance of administrative search warrants. In *Camara*, the Court decided for the first time that a warrant was required for routine housing code inspections, but also held that a lower probable cause standard was justified as an accommodation between the public interest in protecting citizens' safety and health through routine government inspections and the individual's privacy interest against unwarranted governmental intrusions protected by the fourth amendment.[2]

Advance Notice

The primary purpose of subsection (A) is to balance the desire to carry out inspections and monitor and enforce compliance with the act in a cooperative manner between the agency and a board and care home, while simultaneously ensuring that a licensee does not conceal violations or impede enforcement of the act by not allowing an inspection. Thus, the act only prohibits the agency from giving a home advance notice of inspections when the agency believes notice might frustrate the inspection or enforcement of the act. Allowing advance notice promotes a cooperative relationship between a home and the agency. For example, by giving a home advance notice, the administrator, staff and residents can be present and available to provide information important in carrying out an effective inspection. Additionally, advance notice provides the licensee with an opportunity to organize the home's books and records for inspection. Finally, advance notice may be preferable for homes that consistent-

ly have complied with or exceeded the requirements of the act and that have been cooperative with the agency.

On the other hand, the agency is encouraged to adopt a policy of conducting some unannounced inspections. As the United States Supreme Court noted, unannounced inspections "preserve the element of surprise,"[3] and are particularly important in operations where there is "a substantial...[government] interest in improving[...] health and safety conditions."[4] Indeed, many board and care and nursing home licensing statutes provide for or require unannounced inspections[5] for these reasons. The agency therefore might consider adopting regulations requiring annual inspections without advance notice, while allowing other inspections to be announced. Nevertheless, permitting the agency to decide when inspections should be announced or unannounced reflects the belief that based on the agency's experience and expertise, it is best able to judge the risks in providing advance notice to homes.

Search Warrant Alternative

The model act does not provide for warrantless inspections, nor does it require a warrant for every inspection. Under subsection (B), the agency either may obtain a warrant or seek consent to conduct an inspection, although a warrant is mandated without first seeking consent if advance notice has not been given to a home because it is feared the licensee will interfere with the inspection or enforcement of the act. This paragraph also makes it possible for the agency to obtain a warrant for any inspection without first seeking the licensee's permission.[6] The agency may, however, choose to seek consent before securing a warrant, but if the licensee refuses consent, a warrant also must be obtained to compel the inspection.

The primary purpose of this paragraph is to make it possible for inspections to be carried out easily and cooperatively while limiting the risk that inspections or enforcement of the act will be impeded. Obtaining a warrant without first seeking consent assures that the agency has authority to enter a home and compel an inspection when a home has not been given advance notice because it is feared the licensee will refuse consent. Because a warrant prevents the licensee from refusing permission to inspect, there is no opportunity for the licensee to conceal violations.

Another reason the agency may wish to procure warrants rather than seek consent to inspect is that administratively it may be more efficient to apply for warrants for most homes, rather than to seek consent for some homes and warrants for others. Indeed, a primary reason supporting search warrants for routine inspections is that they may be issued more easily than criminal warrants under the lower probable cause standard for administrative search warrants.[7] Further, a reason often cited for not requiring warrants for every inspection is that it would be administratively burdensome and could result in a rubber stamp procedure.[8]

Before deciding that inspections only may be conducted pursuant to consent or a warrant, providing for warrantless inspections of board and care homes was considered. Warrantless inspections should be differentiated from an inspection in which the inspector seeks consent to inspect before obtaining a warrant. Statutes providing for "warrantless" inspections usually authorize a right of entry and provide criminal or other penalties for refusal to allow entry.[9] Under the model act, and in other licensing statutes, however, if the agency seeks consent and consent is refused, the inspector must leave and procure a warrant to compel the inspection, and the licensee is not liable in any way for refusing consent.[10] Prior to the United States Supreme Court's 1967 decisions in *Camara v. Municipal Court* and *See v. City of Seattle*, routine inspections of both homes and businesses without warrants were not considered constitutionally suspect, and warrants generally were required only for criminal searches.[11] However, in *Camara,* the Court noted that "it is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."[12]

The dilemma is that the fourth amendment's prohibition against unreasonable governmental intrusion has been applied differently to governmental inspections of commercial property than to residential property. In pervasively regulated business situations, the Supreme Court has upheld warrantless inspections, noting that a commercial property owner does not enjoy the same privacy expectation enjoyed by an individual in the sanctity of his or her home.[13] The Supreme Court in *Donovan v. Dewey* stated,

> ...a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.[14]

Under the model act, a board and care home should be considered to be a pervasively regulated business. Although *Donovan* involved a federal statute, the purpose and nature of the regulatory statute in *Donovan* may be analogized to the model act. The model act is a similar comprehensive state statutory scheme containing specific standards and setting out the frequency, circumstances, purpose and scope of inspections. As in *Donovan*, therefore, licensees should be fully aware that inspections regularly will be conducted of their board and care homes under the model act. Warrantless inspections also have been justified by the Supreme Court where a substantial or urgent federal interest was involved and inspections were necessary to properly enforce a federal regulatory statute.[15] Again, the model act is a similar statutory scheme for states that furthers a substantial state interest in protecting residents and assuring safe and sanitary living conditions. This reasoning, thus, also supports warrantless inspections of board and care homes.

Finally, state courts have upheld warrantless inspec-

tions of various types of health care facilities, including nursing homes and hospitals, relying upon the Supreme Court's commercial property decisions.[16] These decisions provide further support for warrantless inspections of board and care homes.

It might be argued that warrantless inspections are not constitutional if residents are considered similar to persons leasing other residential premises and therefore have a fourth amendment privacy interest in their residence in a board and care home. Although residents in a board and care home may have a reasonable expectation of privacy in searches for criminal evidence,[17] a resident's privacy expectation is minimal as to governmental inspections to enforce the model act. This privacy expectation is diminished by the continuous presence and involvement of the licensee and staff, the provision of numerous services, the vulnerability and dependency of the residents upon the licensee and staff, and the comprehensive and strict government regulation of board and care homes. Indeed, the state court decisions that upheld warrantless inspections of health care facilities did not even consider the patients' privacy expectations.

The only situation in which a warrant to inspect may be required is in a small home in which the licensee resides and provides board and care services to a few individuals. This is often called an adult foster care or family home. In a similar factual situation, one court recently required a warrant to conduct an inspection of a residence in which an individual provided day care to children in her own home.[18]

For reasons noted below, the model act does not include a provision found in a number of board and care licensing statutes stating that an operator is deemed to have consented to inspections by applying for or holding a license.[19] These provisions are based upon either the implied consent or the conditional privilege theory. They theory of implied consent is that acceptance of a license to engage in a business regulated by statute constitutes implied consent to inspections authorized or required by such statute. This theory has been called a "fiction," since an individual is presumed to have consented when no consent in fact has been given. Indeed, in recent Supreme Court cases, the Court seems to have rejected implied consent as support for warrantless inspections.[20]

The conditional privilege theory states that a government benefit, such as a license, can be conditioned upon waiver of constitutional rights. However, a provision which conditions the granting of a license on the licensee's agreement to submit to inspections may not be presumed constitutionally valid any more than a provision is presumed valid if it specifically allows warrantless inspections. In both instances, the regulatory scheme must be analyzed for its reasonableness to determine whether a warrant would be required under the fourth amendment.[21]

Consent Exception to a Search Warrant

As noted earlier, this section allows the agency to obtain consent from a licensee to conduct an inspection as an alternative to securing a warrant, unless a home has not been given advance notice because the agency believes that the licensee may frustrate the inspection or enforcement of the act. An individual's consent to a search is a traditional exception to a warrant requirement. There are four issues relating to consent under the act: when consent should be sought; who may consent; the standard for determining valid consent; and implied consent. Implied consent was discussed in the previous section.

The model act's warrant requirement is intended to permit inspections and enforcement of the act without risking a licensee's refusal to consent to an inspection. Nevertheless, because it is anticipated that most licensees will agree to inspections, the act gives the agency discretion to seek consent to inspect before obtaining a warrant. Most licensees will consent to inspections for a number of reasons. First, the licensee has a continuous and ongoing relationship with the agency. In addition, little is gained by refusing consent because obtaining a warrant is easy under the lower probable cause standard for administrative searches.[22] Further, the agency may want to seek consent in order to reduce the administrative burden of obtaining warrants for every inspection.

The model act gives only the licensee the right to consent to an inspection, although a licensee may want to delegate authority to the administrator to consent to an inspection. The issue of whether the administrator has been given authority by the licensee to consent would be governed by principles of agency law in the state and therefore is not addressed in the model act. As discussed earlier, because residents in a board and care home have a minimal expectation of privacy as to governmental inspections for violations of the model act, residents are unlikely to have a fourth amendment right to demand a warrant or to consent to an inspection. Moreover, the licensee has an overriding interest in the results of an inspection under the model act, because any agency action or sanctions are brought against the licensee, not the residents.[23] Still, the model act recognizes the privacy of residents by giving them a right to remove personal effects from their bedrooms prior to an inspection.

It is not clear whether the standard for determining a valid express consent is lower in administrative search cases than for criminal searches. One federal appeals court held that a lower standard is justified in administrative searches because, unlike a defendant's consent to a search for criminal evidence, consent to warrantless inspections is not inherently suspect.[24]

Probable Cause Standard for Issuance of Administrative Search Warrants

The standard and procedures for obtaining a warrant are not included in the model act because they are governed by constitutional law principles and other state statutory provisions. The Supreme Court has established a lower probable cause standard for administrative searches than for criminal searches. An administrative search warrant may be issued for routine inspections if "reasonable legislative or administrative standards for conducting an area inspection exist with respect to a particular dwelling. Such standards...may be based upon the passage of time,

the nature of the building...or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."[25] However, for non-routine inspections based upon a complaint or other evidence of a specific violation, it is likely that the traditional probable cause standard would apply.[26]

Emergency Doctrine Exception to a Search Warrant

Although the model act does not include an emergency exception to obtaining a warrant, an inspector should be able to enter a home lawfully without a warrant to render aid if the occupants lives are in danger. Under the emergency exception to a warrant requirement, warrantless entries for the purpose of preserving life or rendering aid generally are valid where there is a threat to human life or health.[27] At least one board and care licensing statute specifically authorizes "emergency inspectorial searches" without a warrant.[28]

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1. *See, e.g.,* Cal. Civ. Proc. Code §§ 1822.50-.57 (1973); Hawaii Rev. Stat. § 346-42 (Supp. 1981); Neb. Rev. Stat. §§ 29-830-835 (1943); N.M. Stat. Ann. § 24-1-16-19 (1981).
2. *Camara v. Municipal Court,* 387 U.S. 523, 534 (1967).
3. *See v. City of Seattle,* 387 U.S. 541, 545 n.6 (1967); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 316 (1978).
4. *Donovan v. Dewey,* 452 U.S. 594, 602 (1981).
5. About one-third of the statutes have provisions for unannounced inspections. *See, e.g.,* Mass. Ann. Laws ch. 111, § 72 (Michie/Law. Co-op. Supp. 1982); Minn. Stat. Ann. § 245.804 (West Supp. 1982-1983); Mo. Ann. Stat. § 198.022 (Vernon Supp. 1982); N.Y. Mental Hyg. Law § 31.07 (McKinney Supp. 1982-1983) (one unannounced annual inspection required); Tenn. Code Ann. § 33-1809 (Supp. 1982). *See also State Laws and Programs Serving Elderly Persons and Disabled Adults,* 7 Mental Disability L. Rep. 158, 181-88 (1983).
6. The Supreme Court discussed the issue of whether consent should be sought before obtaining a warrant in a business situation in *See v. City of Seattle,* stating:

   > We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the method of the regulation involved and may differ from standards applicable to private homes.

   387 U.S. at 545 n.6. In *Camara v. Municipal Court,* 387 U.S. 523 (1967), a warrant was required to inspect a personal residence, and the Court noted that "it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." *Id.* at 539-40.
7. *Camara,* 387 U.S. 523; *Marshall,* 436 U.S. 307.
8. In *Camara,* 387 U.S. at 532, however, the Court rejected the position of *Frank v. Maryland,* 359 U.S. 360 (1959), that an administrative search warrant would be a "rubber stamp" warrant which provides no protection at all to the property owner." 387 U.S. at 532.
9. *Camara,* 387 U.S. at 527; *See,* 387 U.S. at 542; *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970); *United States v. Biswell,* 406 U.S. 311 (1972); Hawaii Rev. Stat. § 346-41 (Supp. 1982); Kan. Stat. Ann. § 39-935 (1981). Iowa's board and care licensing law states that a warrant is not required. Iowa Code Ann. § 135C.16 (West Supp. 1982-83). *See also infra* note 20. In *Donovan,* however, there were no penalties for refusing entry and the agency was required to obtain a court order to gain entry. 452 U.S. 594.
10. *See, e.g.,* Fla. Stat. Ann. § 400.434 (West 1981); Mo. Ann. Stat. §§ 198.022, 630.730 (Vernon Supp. 1982); Me. Rev. Stat. Ann. tit. 22, § 7804 (1980); W. Va. Code § 16-15C-9 (1979).
11. *See, e.g., Frank v. Maryland,* 359 U.S. 360; *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960); *Givner v. State,* 124 A.2d 764 (1956). The basic thrust of the fourth amendment is to safeguard the privacy and security of individuals against abritrary invasions by government officials. *Wolf v. Colorado,* 338 U.S. 25, 27 (1949). The fourth amendment's prohibition against unreasonable searches and seizures and the probable cause requirement for issuance of a warrant together have been interpreted consistently by the Supreme Court to mean that, except in "certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." *Camara,* 387 U.S. at 528-29.
12. 387 U.S. at 530.
13. *Donovan,* 452 U.S. at 598-99. The Supreme Court has held that the fourth amendment applies to all private property, including both residences and commercial premises. The privacy interest in the sanctity of one's home, however, has been of special concern in the Court's Fourth Amendment holdings. *Donovan v. Dewey,* 452 U.S. at 594; *Barlow's,* 436 U.S. 307; *See,* 387 U.S. 523. Following its decision in *Camara,* in which warrantless inspections of private residences were struck down, the Court in *See v. City of Seattle* held that a warrant also was required to conduct an inspection of commercial premises, but stated:

    > We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.

    387 U.S. at 545-46. Following the *Camara* and *See* decisions the Court then upheld warrantless inspections in two cases, *Colonnade,* 397 U.S. 72, and *Biswell,* 406 U.S. 311, both of which involved pervasively regulated businesses. The Court again, however, struck down warrantless inspections of business premises under the Occupational Safety and Health Act in *Marshall v. Barlow's, Inc.,* 436 U.S. 307.

    The essential conflict involves the substantial and often urgent public interest furthered by routine or periodic government inspections and the right to privacy secured by the fourth amendment. *See* Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement,* 64 Cornell L. Rev. 856 (1979); Note, *Rationalizing Administrative Searches,* 77 Mich. L. Rev. 1291 (1979); Comment, *The Fourth Amendment and Administrative Inspections,* 16 Hous. L. Rev. 399 (1979). Numerous law journal articles and treatises have examined the issue of warrantless administrative searches. *See, e.g., id.;* Rothstein, *OSHA Inspections After Marshall v. Barlow's, Inc.,* 1979 Duke L. J. 63 (1979); Note, *Administrative Agency Searches Since Marshall v. Barlow's, Inc.: Probable Cause Requirements for Non-Routine Administrative Searches,* 70 Geo. L. J. 1183 (1982); Note, *Constitutional Law—Warrantless Administrative Searches and the Two-step Test of Donovan v. Dewey,* 56 Tul. L. Rev. 1467(1982); Note, *Fourth Amendment—Warrantless Administrative Inspections of Commercial Property,* 72 Sup. Ct. Rev. 1222 (1981); Note, *Procedures for Attacking OSHA Inspection Warrants,* 66 Va. L. Rev. 983 (1980); Comment, *Camara, See, and Their Progeny: Another Look at Administrative Inspections Under the Fourth Amendment,* 15 Colum. J. L. & Soc. Probs. 61 (1979); Comment, *Constitutional Law—Fourth Amendment—OSHA—Administrative Searches of Commercial Establishments—Marshall v. Barlow's, Inc.,* 25 N.Y.L. Sch. L. Rev. 414 (1979); Comment, *Administrative Roulette: Safety Inspections and Probable Cause in Light of Marshall v. Barlow's, Inc.,* 23 St. Louis U.L.J. 769 (1979); Comment, *Administrative Searches and the Fourth Amendment's Warrant Requirement,* 32 Ark. L. Rev. 755 (1979); 68 Am. Jur. 2d *Search and Seizure* §§ 1-63 (1973); 1 K. Davis, *Administrative Law Treatise* §§ 4:3-4:22 (1978); W. Gellhorn & C. Byse, *Administrative Law*

490-504 (6th ed. 1974); 3 W. LaFave, *Search and Seizure* (1978); B. Schwartz, *Administrative Law* (1976).

14. *Donovan,* 452 U.S. at 600.

15. *Id.* at 600-03; *Biswell,* 406 U.S. at 317.

16. *See People v. Firstenberg,* 155 Cal. Rptr. 80 (Cal. Ct. App. 1979) (warrantless inspection of skilled nursing facility); *People v. White,* 65 Cal. Rptr. 923 (Cal. App. Dep't Super. Ct. 1968) (implied consent to warrantless inspection of hospital); *Uzillia v. Commissioner of Health,* 367 N.Y.S.2d 795 (N.Y. Sup. Ct. App. Div. 1975) (warrantless inspection of nursing home).

17. The fourth amendment's prohibition against unreasonable searches extends to "the right of the people to be secure in their persons, houses, papers and effects." Emphasis should not be placed upon the "physical location" of a search; thus, the individual's personal security is protected by the fourth amendment, whether such security is found in one's home, place of business, or other place. *See* 68 Am. Jur. 2d *Search and Seizure* §§ 16-21(1973). For example, privacy may be found in a friend's apartment, taxicab, private vehicle, summer home, telephone booth, or public locker. *Id.*

    Under *Katz v. United States,* 389 U.S. 347 (1967), and later decisions, the inquiry focuses upon the justifiable, reasonable, or legitimate expectations of privacy that the government has invaded, encompassing both the individual's actual expectation of privacy, and society's recognition that an expectation of privacy is reasonable. *Id.; Dow Chemical Co. v. United States,* 536 F. Supp. 1355 (E.D. Mich. 1982); *See generally* G. Ashdown, *The Fourth Amendment and the Legitimate Expectation of Privacy,* 34 Vand. L. Rev. 1289 (1981).

    Residents of various types of leased premises, including hotel rooms, boarding rooms, apartments, and dormitory rooms, have been held to have a reasonable expectation of privacy, and thus the lessor had no right to consent to a warrantless search of such premises. *Annot.,* 86 A.L.R.2d (1962) (Later Case Service 1979); 68 Am. Jur. *Searches and Seizures* § 18 (1973) (Supp. 1983); 2 A.L.R.4th 1173-1214 (1980) (Supp. 1983); *Stoner v. California,* 376 U.S. 483 (1964).

18. *Rush v. Obledo,* 517 F. Supp. 905 (N.D. Cal. 1981). Although the court first discussed the issue as a commercial property situation, the decision seemed to rest on an analysis of the home as a personal residence. The court stated that the business was operated out of the caregiver's own private home, and that the home was zoned for residential use and was used to provide day care in the same way it is used for residents of the home. The caregiver, therefore, had a fourth amendment privacy right in her personal residence to demand a warrant before permitting an inspection.

19. *See, e.g.,* Ariz. Rev. Stat. Ann. § 36-424 (Supp. 1982-1983); Fla. Stat. Ann. § 400.434 (West 1981); Okla. Stat tit. 63, § 1-1911 (Supp. 1981-1982); Wis. Stat. Ann. § 50.03(2)(d) (Supp. 1982).

20. The Court in *Biswell* compared consent to a warrantless inspection authorized by statute and consent to a search pursuant to a warrant, reasoning:

    > Respondent's submission to lawful authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. In this context, *Bumper v. North Carolina,* 391 U.S. 543 (1968), is inapposite, since there the police relied on a warrant that was never shown to be valid; because their demand for entry was not pursuant to lawful authority, the acquiescence of the householder was held an involuntary consent. In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent but on the authority of a valid statute.

    406 U.S. at 315. For cases and other discussion criticizing or rejecting the implied consent theory, *see* W. LaFave, *supra* note 13, at 219-21; Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595 (1960); Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 Colum. L. Rev. 321 (1935); *United States v. Chicago,* 282 U.S. 311, 328-29 (1931); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958); *Spevack v. Klein,* 385 U.S. 511 (1967).

    In *Biswell,* 406 U.S. 311, and *Donovan,* 452 U.S. 594, the Court instead focused on the business operator's limited privacy expectation in a pervasively regulated business. By accepting a license, a board and care licensee is aware or informed of licensing requirements (including inspections, the inspector's authority, and standards which must be complied with). As *Biswell* noted, consent is not relevant; rather it is whether valid statutory authority exists for the inspection. 406 U.S. at 315.

21. *See* W. LaFave, *supra* note 13, at 219-21. *See also Zap v. United States,* 328 U.S. 624 (1946); *Flemming v. Nestor,* 363 U.S. 603 (1960).

22. *Camara,* 387 U.S. at 534-39; *Barlow's,* 436 U.S. at 319-23. In *Marshall v. Barlow's, Inc.,* the Supreme Court noted that "the great majority of businessmen can be expected in normal course to consent to inspection without warrant. . . ." 436 U.S. at 31.

23. *See infra* sections 20-38. According to one commentator, however, a landlord should not have the right to consent to inspections of a tenant's quarters because of the landlord's interest in preventing illegal conduct. W. LaFave, *supra* note 13, at 205.

24. *United States v. Thriftimart,* 429 F.2d 1006 (9th Cir. 1970). In *Thriftimart,* the court stated that "consent to an inspection is not only not suspect but is to be expected. The inspection itself is inevitable. Nothing is to be gained by demanding a warrant." *Id.* at 1009. Other factors which were held to justify a less stringent standard were that a citizen is unlikely to be surprised by an inspector and the inspector is not in uniform, is unarmed, and inspects during business hours.

    A more recent Supreme Court case, *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), decided after *Thriftimart,* held that consent to a police search must be voluntary, and voluntariness is determined from a totality of the circumstances. To what extent this case applies to administrative searches is unclear. *See* W. LaFave, *supra* note 13, at 203-05.

25. *Camara v. Municipal Court,* 387 U.S. at 538; *Marshall v. Barlow's, Inc.,* 436 U.S. at 319. The reasons for a lower standard given by the Court in *Camara* included: (1) a long history of judicial and public acceptance of routine inspection programs; (2) public interest in abating and preventing dangerous conditions, for which no other technique can achieve acceptable results; and (3) relatively limited invasion of citizen privacy since an inspection is neither personal nor seeks criminal evidence. 387 U.S. at 537.

26. *See, e.g.,* Note, *Administrative Search Warrants,* 58 Minn. L. Rev. 607, 641 (1974); W. LaFave, *supra* note 13, at 209-10; Note, *The Fourth Amendment and Housing Inspections,* 77 Yale L. J. at 539, n. 66; Comment, *OSHA v. The Fourth Amendment: Should Search Warrants Be Required for "Spot Check" Inspections?* 29 Baylor L. Rev. 283 (1977).

    It has been suggested that "the complaint necessary to supply probable cause would need to be nothing more than an anonymous telephone tip." W. LaFave, *supra* note 13, at 210. *But see Gates v. Illinois,* 103 S. Ct. 2317 (1983), which required more indicia of truthfulness and accuracy than suggested by this commentator.

27. See cases cited in Note, *The Emergency Doctrine, Civil Search and Seizure and the Fourth Amendment,* 43 Fordham L. Rev. 571, 584 nn. 102 & 103 (1975).

28. N.M. Stat. Ann. § 24-1-19 (1981). *See also* Hawaii Rev. Stat. § 346-42 (Supp. 1981); Neb. Rev. Stat. § 29-832 (1943).

Section 20.6. Consultation with Other Agencies.

If after an inspection the agency believes that it does

not possess sufficient knowledge or expertise to determine whether a home is in compliance with any requirement of the Act, the agency shall obtain information from other agencies that have such knowledge or expertise.

COMMENT

This section is intended to compel the agency to utilize the expertise of other agencies with greater or more in-depth knowledge concerning certain requirements of the act or particular populations residing in board and care homes. New York's residential care facility licensing law requires the licensing agency to enter into a cooperative written agreement with the department of mental hygiene to develop a system of joint inspections in homes where a significant number of mentally disabled persons reside.[1]

A licensing agency inspector must have general knowledge regarding the needs and problems of elderly and disabled persons, but should not require expertise greater than is necessary to determine a home's compliance with licensing standards. Information relating to special populations may be necessary in certain areas, such as implementation of the board and care plan. Most of the act's requirements, however, should not require in-depth understanding of special populations. Therefore, joint inspections with other agencies, such as the state's mental health or aging agency, generally should not be necessary. Instead, where a need exists for greater expertise, this section requires the licensing agency to consult with other agencies.

1. N.Y. Soc. Serv. Law § 461-a(1) (McKinney Supp. 1981-1982).

SECTION 21. COMPLAINTS.

(A) A person who believes that this Act has been violated may file a complaint with the agency.

(B) The agency shall investigate any complaint filed under subsection (A), unless the agency reasonably believes the complaint is without merit. If the agency reasonably believes a requirement of the Act has been violated, it shall conduct an inspection of the home as provided in section 20.1

(C) A complaint filed with the agency under subsection (A) which is subsequently released to the home that is the subject of the complaint or to any member of the public shall not disclose the name or identifying characteristics of the complainant or the name of the resident who is the subject of the complaint, unless:

(1) the complainant or resident consents in writing to the disclosure; or

(2) the investigation results in a judicial proceeding and disclosure is ordered by the court.

If disclosure is essential to the investigation, the complainant shall be given an opportunity to withdraw the complaint before disclosure.

(D) Upon request of the complainant, the agency shall inform the complainant or, if requested by the complainant, the complainant's designated representative, of the results of the investigation and any action taken by the agency.

COMMENT

The model act's provisions regarding inspection, correction procedures, and imposition of administrative sanctions apply to both violations discovered pursuant to a complaint and those identified pursuant to a routine inspection. The intent of this section is to provide separate additional procedures for resolving complaints, including protection from disclosure of the complainant's identity and informing the complainant of the agency's actions in response to the complaint. It is designed to encourage the public's involvement in assuring that board and care homes are in compliance with the model act's standards.[1] This provision is based upon Indiana's health facilities statute, which like a number of other board and care statutes, has special provisions for resolving complaints against a facility.[2]

1. *See* Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement*, 57 N.C.L. Rev. 1317, 1379 (1979), in which the author notes that through statutory complaint mechanisms, "several states are experimenting with approaches to encourage greater public and community involvement in nursing home quality assurance." *See also* Commission on Legal Problems of the Elderly, American Bar Association, *Model Recommendations: Intermediate Sanctions for Enforcement of Quality Care in Nursing Homes*, 36-41 (July 1981).

2. *See* Ind. Code Ann. § 16-10-4-14 (Burns Supp. 1982). *See also* Ill. Ann. Stat. ch. 111½, § 4153-702 (Supp. 1982-1983); Iowa Code Ann. § 135C .37-38 (West Supp. 1982-1983); Okla. Stat. tit. 63, § 1-1940 (Supp. 1982); Mich. Comp. Laws Ann. § 400.723 & 333.20176 (West Supp. 1982); W. Va. Code Ann. § 15-5C-8 (1979); Wis. Stat. Ann. § 50.03(f) (West Supp. 1982).

SECTION 22. IDENTIFICATION AND PROCEDURES FOR CORRECTION OF VIOLATIONS.

Section 22.1. Notice of Violation.

(A) If, as a result of an inspection, the agency determines that a condition in the home violates a regulation or provision of this Act, the agency shall prepare a notice of violation in writing.

(B) The notice of violation shall state the following:

(1) a description of each condition in the home that constitutes a violation;

(2) each regulation or statutory provision alleged to have been violated;

(3) except as provided in section 22.5, the date by which violations must be corrected as specified in the notice of violation, but no later than ninety (90) days after receipt of the notice;

(4) the requirements for filing a report of com-

pliance as provided in section 22.3;

(5) sanctions that may be imposed against the home for failure to correct the violations or failure to file the report of compliance by the date specified in the notice of violation;

(6) except as provided in section 24.4, the right to contest the violations if an administrative sanction is imposed as provided in section 24.3; and

(7) the right to apply for a variance as provided in section 19.

(C) Except as provided in section 22.5, the notice of violation shall be served upon the licensee personally or by certified mail within five (5) working days of the inspection.

Section 22.2. Conference.

(A) At any time after receipt of a notice of violations as provided in section 22.1, or an inspection report as provided in section 20.5, the licensee or the agency may request a conference. Except as provided in section 22.5, the conference shall be scheduled within seven (7) days of a request by either party.

(B) The purpose of the conference is to discuss the violations stated in the notice of violation and to provide information to the licensee to assist the licensee in complying with the requirements of the Act.

(C) The request by a licensee or the agency for a conference shall not toll the running of any time periods as provided in this Act.

Section 22.3. Report of Compliance.

(A) Except as provided in section 22.5, upon correction of the violations specified in the notice of violation, the licensee shall file a report of compliance with the agency no later than five (5) days after the date by which violations must be corrected as specified in the notice of violation.

(B) The report of compliance shall be in writing and shall state:

(1) each violation listed in the notice of violation; and

(2) a description of how each violation has been corrected.

(C) The licensee shall sign the report of compliance, affirming its contents, and the signature of the licensee shall be notarized.

Section 22.4. Reinspection.

The agency shall conduct an inspection of the home as provided in section 20.1 within thirty (30) days after the date the agency receives the report of compliance or after the date by which violations must be corrected as specified in the notice of violation.

COMMENT

The primary intent of these sections is to give licensees prompt notice and an opportunity to correct violations prior to imposing a sanction, and to require the agency to provide information to assist licensees in correcting such violations.

Many licensing agencies and commentators believe that providing licensees with an opportunity to correct violations and providing them with information to assist in correcting violations induce compliance in a high percentage of cases before formal proceedings to invoke sanctions are necessary.[1] Second, providing an opportunity to correct deficiencies and authorizing a conference between the agency and licensee reflects a desire to encourage compliance in a spirit of cooperation between the agency and the licensee in providing high quality board and care services.[2] Third, the procedures for notice and an opportunity to comply represent a traditional approach found in most statutory enforcement schemes, referred to by some courts as the "second chance doctrine."[3] Finally, provisions that require agency assistance reflect recognition that many violations may result from a licensee's lack of knowledge of licensing requirements, methods of compliance, and financing mechanisms. Studies of enforcement problems in the board and care area also clearly point to the benefit of providing education to board and care home licensees.[4]

Providing an opportunity for a conference is derived from successful experiences in housing code enforcement. For example, housing courts around the country have begun to adopt innovative resolutions to code enforcement, which include housing clinics or special educational programs, especially for landlords with financial problems.[5] In addition, some board and care licensing agencies already provide consultation or technical assistance to board and care home operators in order to assist them in correcting violations.[6] The agency may wish to prepare a general information pamphlet for licensees if it finds there are common problems among licensees in complying with the act. The type of information helpful to the licensee that might be discussed at a conference may include information relating to financing, financial planning, or bookkeeping.

The report of compliance is designed to provide a mechanism for a licensee to inform the agency that violations have been corrected, without requiring the agency to reinspect the home immediately to determine compliance after the time period to correct expires.[7] The agency is given thirty (30) days in which to reinspect the home after the report of compliance has been filed or after the date by which violations must be corrected.

Finally, the licensee is informed in the notice of violation of the right to contest the violations if an administrative sanction is imposed. Because the notice of violation does not cause a detriment to the licensee, a hearing is not necessary at the time the licensee receives the notice; the licensee may contest the existence of the violations at the same time that he or she contests a sanction, if a sanction later is imposed by the agency.

1. In Michigan, the board and care agency claims that consultation is a key element in achieving a 90 percent compliance rate without imposition of sanctions. C. Harmon, *Board and Care: An Old Problem, A New Resource* 26 (Center for the Study of Social Policy, Washington, D.C., June 30, 1982). In a national survey of state agencies, 50 percent of the agencies stated that consultation was a useful strategy and that it was a major regulatory device. R. Stone, M. Saunders, & R. Newcomer, *Descriptive Analysis of Board and Care Policy Trends in the Fifty States* [hereinafter cited as *Descriptive Analysis*] 15 (Aging Health Policy Center, San Francisco, Calif. 1982). The survey found that formal sanctions were only utilized as a last resort. *Id.* at 16. It is not clear from this data whether rare imposition of sanctions means that compliance is achieved in the majority of cases through consultation or whether violations are ignored. If compliance is not achieved, violations simply may remain unabated.

2. Various commentators have suggested the need for a consultative or negotiative approach in nursing home enforcement to complement enforcement by imposition of sanctions in order to minimize friction and hostility. *See* Commission on Legal Problems of the Elderly, American Bar Association, *Model Recommendations: Intermediate Sanctions for Enforcement of Quality of Care in Nursing Homes* 38 (1981); J. Christianson, *Long-Term Care Standards, Enforcement and Compliance,* 4 J. Health Pol., Pol'y & Law 414, 420-21 (1979).

3. *See Valley View Convalescent Home v. Dept. Social Health Services,* 599 P.2d 1313, 1317 (Wash. Ct. App. 1979), citing a number of federal and state cases for the proposition that an agency is required by state statute to notify and give the licensee "an opportunity to put his house in lawful order before more formal agency" proceedings are undertaken. *Id.* Most board and care licensing statutes have notice and opportunity to comply provisions. *See, e.g.,* Calif. Health and Safety Code § 1534 (1979); Minn. Stat. § 144.653 (West 1983); Utah Code Ann. § 26-21-20 (1983); W. Va. Code § 16-5C-10 (1979), for statutes giving simple notice and an opportunity to comply. Examples of statutes with more comprehensive provisions are: Ind. Code Ann. § 16-10-4-17 (Burns 1983); Kan. Stat. Ann. § 39-935 (1981); Mo. Rev. Stat. Ann. § 536.067 (Vernon Supp. 1983); Okla. Stat. Ann. tit. 63, § 1-1914 (West Supp. 1983); Wis. Stat. Ann. § 50-053 (West Supp. 1983-84).

4. A 1980 board and care report states that lack of knowledge regarding standards or how to meet them, rather than willful disregard of the law, is the cause of most violations. C. Harmon, *supra* note 2, at 25. In the housing area, one commentator also has noted:

> Owners willing to comply frequently need various forms of assistance. Even owner-occupants in better neighborhoods often fail to recognize the need for repairs, do not know how to repair or procure a reliable contractor, or do not acknowledge the need to prevent rapid deterioration.

Note, *Enforcement of Municipal Housing Codes,* 78 Harv. L. Rev. 801, 858 (1965).

A survey of board and care operators in Pennsylvania also revealed that only 20% had knowledge of standards in all areas. *See Board and Care Homes, A Study of Federal and State Actions to Safeguard the Health and Safety of Board and Care Home Residents,* [hereinafter cited as *I.G.'s Report*] Office of the Inspector General, U.S. Department of Health & Human Services (1982). The *I.G.'s Report* also pointed out that well-trained inspectors who can provide technical assistance to operators are among the most important components of effective enforcement system. *Id.* at 24.

5. For example, a housing clinic was funded in Pittsburgh to assist defendants in housing court code enforcement cases. As noted by the housing court judge:

> Many code violators ...do not respond appropriately to the threat of punishment but rather require understanding and education in housing codes and assistance in complying with these codes. Many defendants have difficulty coping with their responsibilities as property owners. Some need counselling; others need instruction in code compliance and still others need someone to help coordinate all of the factors necessary to secure abatement of their violations."

Penkower, *The Housing Court of Pittsburgh,* 17 Urb. L. Ann. 141, 152-53 (1979).

Cases referred to the housing clinic are those in which violations are primarily due to the landlord's lack of knowledge of code standards, lack of financial means or knowledge of financing techniques, and personal or psychological problems of the defendant.

See also LoRusso, *The Buffalo Housing Court: A Special Court for Special Needs,* 17 Urb. L. Ann. 199, 203 (1979), in which the judge of the Buffalo Housing Court noted that "pun[i]tive measures alone could not accomplish housing code enforcement. Because many code violators are without funds, imposing jail sentences or fines could not eliminate code violations. Thus, a program of education and counseling was created to assist those code operators." *Id.* A similar approach is taken by the housing court in Springfield, Massachusetts. *See* Croteau, *Housing Specialists in the Hampden County Housing Court,* 17 Urb. L. Ann. 85 (1979).

6. States with statutory authority include the following: mandatory annual visits for consultation — Mich. Comp. Laws Ann. §333.20155 (West Supp. 1982); consultation for purpose of inspection — Okla. Stat. Ann. tit. 63 § 1-1911 (West Supp. 1983); mandatory periodic visits for consultation — Or. Rev. Stat. § 443.435 (1981); pre-license consultation required — Tenn. Code Ann. § 33-1810 (Supp. 1982). The following states also were cited in a recent report as providing consultation: Cal. — consultation in upgrading facilities; D.C. — educational courses; Fla. — training by CMHC's regarding mental health issues; Ill. — ongoing consultation assistance by the operators; N.Y. — inspection teams and operators in corrective actions and local training resources provided to operators; Pa. — inspectors trained to assist operators in compliance and training programs of operators required. Office of the Inspector General, Dep't of Health & Human Serv., *Board and Care Homes* (Apr. 1982). One study noted that consultation is provided on an *ad hoc* basis and helps operators better understand the agency's regulations and improve bookkeeping and provides information regarding the needs of particular client groups. *Descriptive Analysis, supra* note 1, at 15-16.

7. *See, e.g.,* Ill. Ann. Stat. ch. 111½, § 4151-303 (Smith-Hurd Supp. 1982-1983).

Section 22.5. Expedited Procedures for Violations that Present an Imminent Danger.

The agency shall use the procedures specified in sections 22.1-22.4 for violations that present an imminent danger, except as follows.

(A) The notice of violation as provided in section 22.1 shall be served personally upon the licensee within twenty-four (24) hours of the inspection or shall be posted conspicuously on the premises if the licensee cannot be located with reasonable diligence. The notice shall order the licensee to correct the violations and abate the conditions within a specific period of time, but no later than twenty-four (24) hours after receipt of the notice of violation.

(B) The conference as provided in section 22.2 may be scheduled after the time required to abate the conditions or correct the violations.

(C) The agency shall inspect the home as provided in section 20.1 within twenty-four (24) hours after the date by which violations must be corrected as specified in the notice of violation.

COMMENT

The model act requires certain expedited procedures where imminent danger violations are found in order to protect the health and safety of residents immediately. A few board and care licensing statutes have similar provisions.[1]

1. *See, e.g.,* Mo. Ann. Stat. § 198.029 (Vernon 1983); N.J. Stat. Ann. § 55:13B-11 (West Supp. 1982); N.M. Stat. Ann. § 24-1-5(g)(1981).

SECTION 23. MANDATORY ENFORCEMENT ACTIONS.

If, after inspection of a home, the home has not corrected violations by the date specified in the notice of violation as provided in section 22, or if the agency has not received a report of compliance as provided in section 22.3, the agency shall institute one or more of the following actions:

(A) imposition of an administrative sanction as provided in sections 24-27;

(B) civil court action for a receivership as provided in section 31, or an injunction as provided in section 32; or

(C) filing of a criminal complaint as provided in section 38.

COMMENT

The model act requires the agency to initiate enforcement proceedings by imposing an administrative sanction, by initiating a receivership or injunctive action, or by filing a criminal complaint if a home has not corrected violations within the time period required by the agency or if the agency has not received a report of compliance.

Most regulatory statutes do not impose a mandatory enforcement duty upon an agency but give federal or state regulatory agencies discretion to take enforcement action.[1] Some state and federal statutes, however, impose an affirmative enforcement duty upon an agency.[2] Indeed, some board and care licensing statutes mandate the agency to initiate proceedings for certain administrative sanctions or court actions when a home fails to comply with an order to correct violations.[3]

The decision to require enforcement by the agency after efforts have failed to bring a home into compliance is based on several premises. First, it has been noted that in regulating board and care homes and nursing homes, agencies have been reluctant to use sanctions to enforce statutory standards or requirements.[4] Second, it seems appropriate to impose a sanction if violations still exist after the home has been given an opportunity to correct violations and has not exercised its right to seek a temporary or permanent variance. Third, the act does not require imposition of a particular sanction or initiation of a particular court action, but provides an array of alternative administrative and court actions to enable the agency to determine the most appropriate enforcement mechanism for a particular situation. Thus, unlike licensing statutes that have only one or a few sanctions available, such as delicensing or criminal penalties, there are a number of options under the model act which provide flexibility and differing degrees of harshness depending on the violations. Fourth, requiring commencement of an enforcement proceeding not only prevents discriminatory enforcement, but also may ensure that a home will not use dilatory tactics in correcting violations if there is certainty that a sanction will be imposed. Finally, homes may be deterred from falling out of compliance if an enforcement proceeding definitely will be instituted.

One problem with a statute that imposes a mandatory enforcement duty is that, according to one commentator, there is little case law in which a court orders an agency to enforce the provisions of a statute.[5] Indeed, one federal appeals court held that a statute which required initiation of prosecution was "insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes."[6] Another court, however, ordered a federal agency to institute enforcement actions involving school desegregation under a statute which provided that the agency "is authorized and directed to effectuate the provisions" of the statute.[7]

One commentator expresses the primary underlying reason for mandatory enforcement, which is that uncontrolled and absolute discretion accorded by our justice system to prosecutors and administrators in regulatory agencies is inconsistent with fundamental notions of due process.[8] Discretionary power traditionally has not been subject to statutory policies, written prosecutorial standards, or independent judicial review, although some courts have held that such power is not absolute and may be reviewed for abuse of discretion, arbitrariness, or capriciousness.[9] According to one commentator, "an officer who has discretionary power not to enforce has the power to discriminate by refraining from enforcement against a thousand violators and by enforcing against one violator, even if the one violator is less deserving of prosecution than many others."[10]

1. 2 K. Davis, *Administrative Law Treatise* 220, 233 (1979); Diver, *Civil Money Penalties,* 79 Colum. L. Rev. 1435, 1480 (1979).
2. K. Davis, *supra* note 1, at 230-31; Diver, *supra* note 1, at 1480. *See, e.g.,* 49 U.S.C. § 1482 (1978) (Interstate Commerce Act); 30 U.S.C. § 814(a) (Supp. I 1977) (Mine Safety Act); 42 U.S.C. § 7401 (1983) (Air Pollution and Control Act).
3. *See* Ky. Rev. Stat. § 216.577 (1982), which states that the agency must seek an injunction for imminent danger violations; Ky. Rev. Stat. § 216.560 (1982), requiring imposition of civil penalties; W. Va. Code § 16-5C-11(a), requiring suspension of admissions; Ind. Code § 16-10-4-15 (Supp. 1982), mandating suspension of admissions or imposition of a civil penalty or both.
4. R. Stone, *et al., Descriptive Analysis of Board and Care Policy Trends in the 50 States* 9, 13 (Aging Health Policy Center, University of California at San Francisco, 1980); Butler, *A Long-Term Health Care Strategy for Legal Services,* 14 Clearinghouse Rev. 613, 635 (1980).
5. K. Davis, *supra* note 1, at 235.
6. *Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375

(2d Cir. 1973). *See also* K. Davis, *supra* note 1, at 239.

7. *Adams v. Richardson,* 480 F.2d 1159 (D.C. Cir. 1973). *See also* K. Davis, *supra* note 1, at 235.
8. *See* Vorenberg, *Decent Restraint of Prosecutorial Power,* 94 Harv. L. Rev. 1521, 1554-55 (1981).
9. K. Davis, *supra* note 1, at 229; Diver, *supra* note 1, at 1479. Diver states that "[f]or a variety of apparent reasons including separation of powers notions, doubts about judicial competence, or perhaps just the force of history — courts have been extremely reluctant to review prosecutors' charging decisions." *Id. See* K. Davis, *supra* note 1, at 233 for cases holding that discretion is unreviewable. *See also* K. Davis, *supra* note 1, at 232-34 & 244-48 for cases holding that a discretionary determination to prosecute or not to prosecute is subject to judicial review, including, *e.g., Medical Committee for Human Rights v. SEC,* 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972); *Universal-Rundle Corp. v. FTC,* 352 F.2d 831, 834 (7th Cir. 1965); *Dunlop v. Bachowski,* 421 U.S. 560 (1975). For cases requiring implementation or enforcement by an agency of a regulatory statutory scheme, *see Adams v. Richardson,* 480 F.2d 1159; *California Legislative Council for Older Americans v. Mayer,* No. C121481 (Cal. Super. Ct., L.A. Co. 1978).
10. K. Davis, *supra* note 1, at 218.

SECTION 24. ADMINISTRATIVE SANCTION PROCEDURES.

Section 24.1. Notice of Administrative Sanction Imposed for Violations that Do Not Result in Conditions Presenting an Imminent Danger

(A) If the agency imposes an administrative sanction for violations that do not result in conditions presenting an imminent danger, it shall serve a notice of administrative sanction upon the licensee personally or by certified mail.

(B) The notice shall state:

(1) each sanction imposed;

(2) a description of each condition in the home that constitutes a violation;

(3) each regulation or provision of the Act allegedly violated; and

(4) the licensee's right to contest the administrative sanction as provided in section 24.2.

(C) If a civil penalty is imposed, the notice shall state, in addition to the above, the amount of the penalty and the licensee's right to request reduction of the penalty as provided in section 25.2.

(D) A copy of the notice of violation previously served upon the licensee shall be attached to the notice of administrative sanction.

Section 24.2. Right to Contest Administrative Sanctions Imposed for Violations that Do Not Result in Conditions Presenting an Imminent Danger.

(A) A licensee may contest imposition of the following administrative sanctions for violations that do not result in conditions presenting an imminent danger in accordance with adjudication procedures as provided in section 6:

(1) revocation of a license;

(2) nonrenewal of a license;

(3) suspension of admissions;

(4) transfer of residents; and

(5) civil penalties.

(B) If a licensee intends to contest an administrative sanction, the licensee shall request a hearing in writing within ten (10) days after receipt of the notice of administrative sanction.

(C) If a licensee fails to request a hearing within the time provided in subsection (B), the notice of administrative sanction shall be deemed a final order of the agency. The agency may seek court enforcement of the final order as provided in section 29.

(D) Upon receipt of the licensee's request for a hearing as provided in subsection (B), the agency shall hold a hearing as provided in section 6. The hearing shall be held prior to execution of the sanctions listed in subsection (A) and shall be held within thirty (30) days after receipt of the licensee's request for a hearing.

COMMENT

This section of the model act gives a board and care home licensee the right to contest imposition of an administrative sanction. In other sections of the act a person is given the right to contest denial of an application for a license and a licensee is given the right to contest denial of an application for a variance.[1] These statutory rights are intended to ensure that the agency does not arbitrarily or erroneously deprive a licensee of his or her interest in the license.

Once the right to contest agency action is established, the question of what procedures are necessary to satisfy due process must be addressed. A court construing the adequacy of the model act's procedures for contesting the agency actions noted above should hold that these procedures satisfy the requirements of the due process clause.[2] The model act, like most existing board and care home licensing laws, requires that notice of an administrative action be served upon the licensee.[3] Notice is required because other due process rights have little value unless a person is informed that a matter is pending and that he or she has a right to contest.[4] The act's notice of administrative sanction mentions all violations, the proposed sanction, and the licensee's right to contest the sanction. Notice of denial of an application for a license or variance includes a statement of the decision of the agency, the findings in support of that decision, and the right to contest the decision.

Once a licensee indicates that he or she wishes to contest a sanction or denial of an application for a license or variance, the model act provides that the state administrative procedure act takes effect. State administrative procedure act adjudication provisions generally require a full administrative hearing with judicial review upon request of the unsuccessful party.[5]

Subsection 24.2(D) requires a hearing to contest an administrative sanction prior to execution of the sanction against the licensee.[6]

The establishment of a statutory right to contest agency action taken against a licensee is consistent with case law and commentators' views that licensing statutes generally create a property interest in the license that is protected under the fourteenth amendment due process clause. In the 1979 U.S. Supreme Court decision of *Barry v. Barchi,* the court stated that a protected property interest in a license is created when state law engenders a clear expectation of continued enjoyment of a license absent proof of culpable conduct.[7] Once a statute creates a protected property interest, that interest cannot be terminated by the state without the procedural due process required by the fourteenth amendment.[8]

By granting a license and providing that it cannot be revoked or renewal denied except in certain circumstances, the model act engenders an expectation of continued participation in the licensing program. Moreover, administrative law commentators,[9] the federal Administrative Procedure Act, [10] Model State Administrative Procedure Act, [11] and numerous state administrative procedure acts[12] take the position that a license should not be revoked without notice and an opportunity for a hearing. Many states also provide for the right to contest license nonrenewal determinations in their administrative procedure act[13] or case law.[14]

In addition to the state's deprivation of a protected property interest in a license through revocation or nonrenewal of the license, other agency sanctions[15] against a home would be considered to be a deprivation of a protected property interest constitutionally entitling the home to notice and an opportunity to be heard before the sanction is executed when conditions in a home do not present an imminent danger. When the agency transfers residents or suspends admissions, the state is taking adverse action against the home that negatively affects its operation and its license. Further, suspension of admissions, transfer of residents, and imposition of civil penalties constitute financial deprivation to the licensee.

The model act does not provide a board and care home licensee with an opportunity to challenge an initial notice of violation prior to imposition of a sanction. Rather the licensee has an opportunity to contest the violation once the agency has imposed an administrative sanction as a result of the licensee's failure to correct the alleged violation. This is because the licensee is not affected detrimentally until a sanction has been imposed.[16] The licensee has an opportunity to contest the issue of the existence of the violation at the administrative hearing contesting the sanction.[17]

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1. *See* sections 17.3 and 19, and comment, *supra.* Many state board and care home licensing laws include these rights. *See, e.g.,* Ill. Ann. Stat. ch. 111½, §§ 4153-118, 119, 304(e), 309 (Smith-Hurd Supp. 1982-1983); Fla. Stat. Ann. § 400.419(e) (West Supp. 1982).

2. The fourteenth amendment due process clause requires that, at a minimum, a person facing deprivation of a protected interest be provided with notice and an opportunity for a hearing appropriate to the nature of the case. *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950). *See also Smith v. Organization of Foster Families,* 431 U.S. 816, 847 to 855 (1977).

> The minimal due process requirements for licensing hearings . . . demand that the applicant be given:
>
> (1) Adequate notice of any and all charges made affecting the licensee;
>
> (2) An opportunity to be apprised of the claim of opposing parties;
>
> (3) The right to present evidence supportive of its position;
>
> (4) The right of confrontation and cross-examination; and
>
> (5) The right to have findings made solely upon evidence properly presented and received as part of the record.

B. Mezines, J. Stein, J. Gruff, *Administrative Law* § 41.01 (1977 and Supp. 1980).

3. *See, e.g.,* Okla. Stat. tit. 63, § 1-1906F(2) (Supp. 1981-1982); Ill. Ann. Stat. ch. 111½, §§ 4153-118, 4153-119 (Smith-Hurd Supp. 1982-1983); Pa. Stat. Ann. tit. 62, § 1026(c) (Purdon 1968 and Supp. 1982).

4. *Mullane,* 339 U.S. at 314.

5. *See* section 6 and comment, *supra.* The 1961 Model State Administrative Procedure Act provides for an administrative hearing in which opportunity is afforded all parties to respond and present evidence and argument on all issues involved. Findings of fact must be based exclusively on the evidence and on matters officially noticed. Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final hearing decision is entitled to judicial review. Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws §§ 9, 15 (1961).

6. This provision is consistent with constitutional law principles, which require that before a person is deprived of an interest protected under the fourteenth amendment due process clause, he or she be provided with notice and an opportunity for a hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. *Board of Regents v. Roth,* 408 U.S. 564, 570 n.7 (1972) quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).

7. 443 U.S. 55, 64 n.11 (1979) (citing *Perry v. Sinderman,* 408 U.S. 593, 601 (1972); *Board of Regents v. Roth,* 408 U.S. at 564; *Bell v. Burson,* 402 U.S. 535, 539 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

8. 443 U.S. at 64. In *Barry,* the court cited *Bell v. Burson,* an earlier Supreme Court decision, which held that when continued possession of a license is essential to pursuit of a livelihood, the license could not be taken away without adequate due process procedures (402 U.S. at 539 (1971)). The court in *Bell* applied the general proposition that the fourteenth amendment due process clause limits state power to terminate a protected interest (402 U.S. at 539 (citing *Goldberg v. Kelly,* 397 U.S. 254 (1970)).

   State courts also have held that a license authorizing an individual to engage in a particular occupation or business constitutes a protected interest under the fourteenth amendment's due process clause, thereby providing the licensee with a right to notice and an opportunity to be heard when state action is taken against the licensee. *Stewart v. City of San Mateo,* 54 Cal. Rptr. 599, 606 (Cal. App. 1966); *City of Detroit v. Mashlakjian,* 166 N.W.2d 493, 494 (Mich. App. 1968); *State Board of Cosmetology v. Maddux,* 428 P.2d 936, 938 (Colo. 1967); *Georgia Real Estate Commission v. Horne,* 233 S.E.2d 16, 17 (Ga. Ct. App. 1977).

9. *See* F. Cooper, *State Administrative Law,* 147 (1965); Mezines, *supra* note 2, §§ 41.01, 41.02.

10. 5 U.S.C. § 551 (1976).

11. An agency may not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice and an opportunity for an appropriate adjudicative proceeding in accordance with this Act or other statute. This section does not preclude an agency from (i) taking immediate action to protect the public interst in accordance with section 4-501 or (ii) adopting rules, otherwise within the scope of its authority, pertaining to class of licensees, including rules affecting the existing licenses of a class of licensees.
Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws § 4-105 (1981).

12. *See, e.g.,* Ark. Stat. Ann. §24.292 (1981); Cal. Govt. Code §11503 (West 1979); La. Stat. Ann. §49:961 (Supp. 1982); Mich. Comp. Laws Ann. §24.292 (1981); Wash. Rev. Code Ann. §34.04010(3) (Supp. 1983-1984).

13. *See, e.g.,* Cal. Govt. Code §11504 (West 1979); Mich. Comp. Laws Ann. § 24.291 (1981).

14. *See Freidman v. Division of Health,* 537 S.W.2d 547 (Mo. 1976) holding that nonrenewal of a license is entitled to the same due process protection as license revocation. *Id.* at 549; and *Gilchrist v. Bierring,* 14 N.W.2d 724 (1944) holding that if a licensee's conduct has demonstrated that he or she is no longer worthy to operate his or her business, a determination of that fact constitutes the exercise of a judicial function. That function can be exercised only after notice and an opportunity to be heard. 14 N.W.2d at 732.

15. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies,* 79 Colum. L. Rev. 1435, 1487 (1979); Commission on Legal Problems of the Elderly, American Bar Association, *Model Recommendations: Intermediate Sanctions for Enforcement of Quality Care in Nursing Homes,* 9, 22 (1981); Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement,* 57 N.C.L. Rev. 1317 (1979).

16. In challenges to the Occupational Safety and Health Act's civil penalty provision (29 U.S.C.A. § 659(b)), two federal courts of appeals have held that no right to appeal attaches upon issuance of the citation alone. The only detriment to the employer is the monetary penalty. This can only be imposed after opportunity for a hearing. *Atlas Roofing Co., Inc. v. OSHA,* 518 F.2d 990, 1012 (5th Cir. 1975); *Dan J. Sheehan Co. v. OSHA,* 520 F.2d 1036, 1042 (5th Cir. 1975); *see also Lloyd A. Fry Roofing Co. v. EPA,* 415 F. Supp. 799 (W.D. Mo. 1976).

17. Section 9(c) of the Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws (1961) provides that, at a hearing, opportunity shall be afforded all parties to respond and present evidence and argument on all the issues involved. Any contest to the propriety of imposition of a particular sanction would likely involve the question of whether violations constituting a ground for imposition of the sanction existed in the home.

Section 24.3. Notice of Order to Suspend Admissions Immediately and Transfer Residents Immediately for Violations that Result in Conditions Presenting an Imminent Danger.

(A) If the agency issues an order to suspend admissions immediately and transfer residents immediately as provided in sections 26 and 27, it shall serve the order upon the licensee personally or, if the licensee cannot be located with reasonable diligence, it shall post the order conspicuously in the home. The order shall be executed upon issuance.

(B) The order shall state:

(1) that all admissions to the home are suspended and that all residents will be transferred immediately;

(2) the reasons for finding that conditions in the home present an imminent danger; and

(3) the licensee's right to contest the order as provided in section 24.4.

Section 24.4. Right to Contest an Order to Suspend Admissions Immediately and Transfer Residents Immediately for Violations that Result in Conditions Presenting an Imminent Danger.

(A) A licensee may contest imposition of an order to suspend admissions immediately and transfer residents immediately.

(B) If a licensee intends to contest an order to suspend admissions immediately and transfer residents immediately, the licensee shall request a hearing within twenty-four (24) hours after receipt of the order.

(C) If a licensee fails to request a hearing within the time provided in subsection (B), the order shall be deemed final. The agency may seek court enforcement of a final order as provided in section 29.

(D) Upon receipt of the licensee's request for a hearing as provided in subsection (B), the agency shall hold a hearing as provided in section 6 no later than forty-eight (48) hours after receipt of the order by the licensee.

COMMENT

This section authorizes the agency to take immediate action before the opportunity for a trial-type hearing when violations in a home present an imminent danger of death or serious physical harm to the residents. The U.S. Supreme Court has acknowledged that summary administrative action may be justified in emergency situations which present a threat to the public health, safety, or welfare.[1] In these situations, a full trial-type hearing prior to revocation or modification of a license is not practical because the hearing would render any eventual action or order ineffective to protect the public interest.[2]

Because summary administrative action may cause significant detriment to an individual, the Supreme Court has held that, at a minimum, an individual must be provided with notice of the summary action and a prompt hearing following the action.[3] The existence of safeguards that reduce the risk of error also weigh heavily in favor of upholding summary action taken prior to a hearing. The summary action provision included in the model act contains more than the minimal safeguards that are constitutionally required. First, it sets out an imminent danger standard rather than leaving the use of summary procedures completely to agency discretion.[4] Second, the order to suspend admissions and transfer residents provides a statement of the reasons for finding

that conditions in the home present an imminent danger.[5] Third, the order to suspend admissions and transfer residents results in cessation of operation,[6] a mechanism which is limited to eliminating the threat to resident safety.[7] Finally, the licensee may have an oportunity to make an informal statement to the agency upon completion of the inspection disclosing the emergency situation.[8]

In addition to summary administrative action, a preliminary injunction may be sought by the agency when conditions presenting an imminent danger exist in a home. The model act provides for this alternative in section 32. A preliminary injunction tends to reduce the risk of error and the possibility of agency coercion by formalizing the decisionmaking process, providing an impartial decisionmaker, and providing the licensee with an opportunity to present evidence (except when a temporary restraining order is issued *ex parte*).[9] Legislatures also may relax the equity standards traditionally used to obtain a preliminary injunction.[10] However, when the effectiveness of a regulatory response turns on its promptness, a preliminary injunction may be less effective than a summary administrative order.[11] The time factor is particularly important under the model act, since the protested conditions in the home must present an imminent danger of death or serious physical harm to the home's residents. Legislation providing for both summary administrative action and the power to seek an injunction gives the agency more flexibility to fashion an effective remedy for each situation confronted.

1. *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 300 (1982) (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 315 (1908)). The Supreme Court has reached determinations regarding the timing and type of hearing necessary to protect the holder of a property interest by balancing three factors: the individual's private interests in the property, the risk of erroneous deprivation of the interest, and the government's interest in the affected activity. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). The first factor examines the nature of the private interest at stake and the degree to which it has been impaired. The second examines the reliability of the procedures used by the government when it takes action against the private interest holder. Consideration of the third factor yields a determination of the nature and importance of the government's interest in the particular activity. In most license revocation or modification situations, the interests of the property owner are sufficiently great that there must be an opportunity to contest the revocation or modification prior to its taking effect. B. Mezines, J. Stein, & J. Gruff, *Administrative Law* § 41.01 (1977 and Supp. 1980). However, if an emergency exists that threatens the public, protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. *Hodel*, 452 U.S. at 300.
2. Freedman, *Summary Action by Administrative Agencies*, 40 Chi. L. Rev. 1, 2 (1972).
3. *Barry v. Barchi*, 443 U.S. 55, 64 (1979).
4. *Hodel*, 452 U.S. at 301-303; *Freedman, supra* note 2, at 42.
5. *See, e.g., Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Environmental Defense Fund v. E.P.A.*, 465 F.2d 528 (D.C. Cir. 1972).
6. Several state licensing laws authorize similar measures. Md. Code Ann. § 19-328 (Supp. 1982-1983) (restricted admissions); Tex. Rev. Civ. Stat. Ann. art. 4442c, § 6B (Vernon 1976 & Supp. 1982-1983) (order to immediately close); Wis. Stat. Ann. § 50.03(5m) (West Supp. 1982) (transfer of residents).

   Many state administrative procedure acts, following the 1961 Revised Model State Administrative Procedure Act, provide for summary suspension of a license pending proceedings instituted promptly for license revocation or other action if the agency finds: (1) that the public health, safety, or welfare imperatively requires emergency action; and (2) incorporates a finding to that effect in its order. National Conference of Commissioners on Uniform State Law, Revised Model State Administrative Procedure Act, § 14 (1961). *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1012 (West 1983); Ark. Stat. Ann. § 5-712 (1976); Conn. Gen. Stat. Ann. § 4-182 (West 1983); N.J. Stat. Ann. § 52:14B-11 (West 1981); Okla. Stat. tit. 75, § 314 (1976); Wis. Stat. Ann. § 227.01 (West 1982).
7. *Hodel*, 452 U.S. at 301.
8. 443 U.S. at 65; 424 U.S. 319 (1976); Freedman, *supra* note 2, at 49; 2 K. Davis, *Administrative Law Treatise*, § 13.11 (1979 and Supp. 1982).
9. Freedman, *supra* note 2 at 59.
10. It is familiar teaching that a court will not grant a preliminary injunction without a clear showing that the petitioner has no adequate remedy at law; that he will probably succeed at an eventual trial on the merits; that he or she will suffer irreparable injury unless the preliminary injunction is granted; and that the injury he or she will sustain if relief is denied is greater than the injury others will suffer if it is granted. *Id.* at 62.
11. *Id.* at 60. Moreover, as a result of recent U.S. Supreme Court decisions, the language of the model act authorizing the agency to take each of the actions listed in section 24.2(A) would be construed by the courts as creating a property interest protected by the Constitution's due process clause, thereby requiring notice and an opportunity to be heard before the actions are taken against the board and care home licensee. Under these recent decisions, the court looks to the language of a particular statutory or regulatory provision to determine whether an interest protected by the Constitution's due process clause has been created. If the statute or regulation provides that the interest which is the subject of the provision cannot be deprived except for cause, then the interest is a protected property interest. The legislation must limit the discretion of the state by defining the grounds upon which an action can be taken.

    The model act prescribed the conditions under which the actions listed in section 24.2(A) can be taken. A license must be issued if a board and care home is in compliance with the act. An administrative sanction can be imposed upon a board and care home only upon a finding that prescribed grounds exist. A license can be revoked or not renewed only under specified conditions. This language brings the license within the protections mandated by the due process clause. *See, e.g., Logan v. Zimmerman Brush*. 455 U.S. 422 (1982); *Connecticut Board of Pardons v. Dumschat*, 101 S.Ct. 2460 (1981) ("The grounds for a constitutional claim, if any, must be found in statute or other rules . . .") at 2465; *Leis v. Flynt*, 439 U.S. 438, 442-443; *Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Bishop v. Wood*, 426 U.S. 341 (1976); 2 K. Davis, *Administrative Law Treatise* § 11:3 (1979 and Supp. 1982) ("[A] protectible entitlement must have its source in a statute or regulation and not in an agency's habits or precedents."); *Logan, supra* note 13, at 430. ("The hallmark of property. . . .is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'")

SECTION 25. CIVIL PENALTIES.

Section 25.1. Grounds.

The agency may impose a civil penalty against a board and care home in the amount of:

(A) [ten dollars ($10)] per resident or [one hundred

dollars ($100)], whichever is greater, for each day that a violation of a regulation or provision of the Act remains uncorrected after the date by which the violation must be corrected as specified in the notice of violation for:

(1) a violation in a home that results in conditions presenting an imminent danger or a substantial probability of death or serious physical harm to residents of the home;

(2) a violation of a resident's rights as provided in section 10;

(3) a violation of the Act or regulations governing fire safety as provided in section 12.4;

(4) operation of a board and care home without a license; or

(B) [five dollars ($5)] per resident or [fifty dollars ($50)], whichever is greater, for each day that a violation remains uncorrected after the date by which the violation must be corrected as specified in the notice of violation for any other violation of a regulation or provision of the Act.

COMMENT

Since the late 1960s, civil penalty provisions have become popular as an enforcement tool in a wide range of federal and state regulatory statutes intended to safeguard public health, safety, or welfare.[1] As one commentator notes, "[d]isillusioned with cumbersome criminal, injunctive and license removal sanctions, students of regulation have increasingly turned to the civil fine in their search for a more effective enforcement device."[2] A number of board and care home licensing statutes include civil penalty provisions for violations of licensing requirements.[3]

This section divides the violations that constitute grounds for imposition of a civil penalty into two groups based upon their severity and establishes different penalty amounts for each group. The first group, listed in subsection (A), includes four types of violations. Conditions in a home presenting an imminent danger or a substantial probability of death or serious physical harm to residents are serious violations that merit a more costly civil penalty. If violations in a home present an imminent danger, the agency's most pressing need is to alleviate the danger or transfer all residents from the home. Other remedies provided in the model act, such as transfer of residents, injunctions, receivership, and suspension of admissions, address these needs. However, the agency can impose a civil penalty in addition to taking the steps necessary to alleviate the immediate threat to residents.

Similarly, resident rights violations are contrary to a fundamental purpose of the act: to ensure that board and care home residents are not exploited or deprived of their basic human rights by board and care home licensees, administrators, or staff. These violations justify imposition of a higher civil penalty. Fire safety violations also are singled out for higher penalties under the act; this is because these violations are one of the major causes of death and serious injury of board and care home residents.[4] Finally, operation of a home without a license is an egregious violation that merits a civil penalty in a higher amount under the act.[5]

Because other violations are not considered as egregious as those listed in subsection (A), the penalty amount specified in subsection (B) is lower. The imposition of civil penalties for less serious violations has been found to be a particularly effective remedy.[6]

The model act uses fixed, rather than variable, civil penalty amounts. A fixed amount gives a home an opportunity to determine in advance the exact cost of its continuing noncompliance. Moreover, fixed penalties prevent the problems associated with discretionary variable penalty systems. There is little chance that a home with long-continued, serious violations will be subject to an insignificant fine; nor is there a risk that a home with few or less-serious violations that it intends to repair promptly will unexpectedly suffer severe penalties.[7]

Inequity may result from the use of fixed penalty amounts. This, however, is remedied through the model act's provision for reduction of civil penalties.[8] Under section 25.2, a home has an opportunity to produce sufficient information to show that, in its particular case, the fixed penalty amount would be unjust or contrary to the purposes of the model act. In contrast, under a civil penalty system using variable penalty amounts, the burden of determining an appropriate penalty amount is upon an agency that may not possess sufficiently reliable evidence of mitigating circumstances in the case before it.[9] Finally, use of a fixed penalty does not raise any problems concerning unconstitutional delegation of legislative authority.[10]

Imposition of civil penalties on a per resident basis protects against the inequity that could result from imposition of a large fixed penalty amount against a home with a small number of residents and limited operating funds.[11] Moreover, this system ties the penalty amount to the number of residents affected by a violation. The model act, however, does set a minimum threshold penalty amount under subsections (A) and (B) to ensure that penalty amounts exceed the cost of noncompliance, thereby prompting correction of violations.

The amounts included in this provision are bracketed, representing only suggested figures. The goal in setting the amounts is to make penalties high enough to encourage compliance with standards being violated, while recognizing that an excessive penalty amount may deplete funds that could be used to remedy violations and provide services to residents. Nursing home licensing legislation civil penalty amounts are often higher than those in the model act because nursing homes are more likely to make a greater profit than board and care homes.[12]

A final issue is that the model act's civil penalty provision does not apply to publicly run homes. An assessment by the state against the state or one of its counties would result in the expenditure of state funds to enforce a penalty that would further deplete such funds. A Wisconsin case interpreted the state's broadly written

civil penalty provision for nursing homes to exempt state-run nursing homes.[13] The court in *Wisconsin Veteran's Home* reasoned that application of the provision would only harm the state and would have unreasonable results.[14]

1. *See generally* Diver, *The Assessment and Mitigation of Civil Penalties by Federal Administrative Agencies,* 79 Colum. L. Rev. 1435 (1979); *City of Waukegan v. Pollution Control Board,* 311 N.E.2d 146, 149, 150 (Ct. 1974); Schmeltzer & Kitzes, *Administrative Civil Penalties Are Here to Stay — But How Should They Be Implemented?* 26 Am. U.L. Rev. 847, 850-51 (1977); Admin. Conf. of the U.S., Rec. No. 72-6, 1 C.F.R. § 305.72-6 (1983); Occupational Safety & Health Act, 29 U.S.C. §§ 658-666 (Supp. V 1976); Clean Air Act, 42 U.S.C. §§ 7413, 7420 (Supp. V 1981); Federal Water Pollution Control Act, 33 U.S.C. § 1321 (Supp. V 1976).
2. Diver, *supra* note 1, at 1436.
3. *See, e.g.,* Conn. Gen. Stat. Ann. §§ 19-607 to 19-612 (West 1977 & Supp. 1982); Fla. Stat. Ann. §400.419 (West 1981); Ill. Ann. Stat. ch. 111½, § 4153-310 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. §§ 16-10-4-15 to 16-10-4-17 (Burns Supp. 1980); Iowa Code Ann. §§ 135C.36, 135C.40 to 135C.45 (West 1972 & Supp. 1982-1983); Kan. Stat. Ann. § 39-946 (1981); Ky. Rev. Stat. §§ 216.557 to 216.565 (1982); Minn. Stat. Ann., §144.653 (West Supp. 1982-1983); Mo. Rev. Stat. § 198.067 (Supp. 1982); N.J. Stat. Ann. §§ 26:2H-14 to 26:2H-16 (West Supp. 1982); N.Y. Soc. Serv. Law § 460-D (McKinney Supp. 1981-1982); Wis. Stat. Ann. § 50.04 (West Supp. 1982).
4. *Fires in Boarding Homes: The Tip of the Iceberg: Hearing Before the Subcom. on Health and Long-Term Care of the House Select Comm. on Aging,* 96th Cong. lst Sess. 3-21 (1979).
5. A few states include operation of an unlicensed board and care home as grounds for a civil penalty in their licensing legislation. *See, e.g.,* Fla. Stat. Ann. § 400.419(1) (West Supp. 1982); N.J. Stat. Ann. § 26:2H-14.
6. Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement,* 57 N.C.L. Rev. 1317, 1356 (1979).
7. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 Colum L. Rev. 1254, 1285 (1966).
8. *See* section 25.2 & comment, *infra.*
9. Diver, *supra* note 1, at 1481.
10. *See* section 5 & section 5, note 8, *supra.*
11. Imposition of penalties on a per resident basis is used in the Illinois long term care facility licensing legislation. Ill. Stat. Ann. ch. 111½, § 4153-305 (Smith-Hurd Supp. 1982-1983).
12. While nursing home operators receiving funds from the Medicare and Medicaid programs are reimbursed for their costs of operation, many board and care home operators receive only a part of the resident's Supplemental Security Income (SSI) check which may or may not include a state supplement. *See* Social Security Administration, *Supplemental Security Income for the Aged, Blind and Disabled: Summary of State Payment Levels, State Supplementation, and Medicaid Decisions,* Report No. 1-SJB-3 (Jan. 1983).
13. *Wisconsin Veteran's Home v. Division of Nursing Home Forfeiture Appeals,* 310 N.W.2d 646 (Ct. App. 1981).
14. *Id.* at 649.

Section 25.2. Reduction of Civil Penalty.

(A) A board and care home may request reduction of a civil penalty imposed by the agency. The request shall be in writing, shall state the reasons for the request, and shall be made within ten (10) days of the home's receipt of the notice of administrative sanction as provided in section 24.1. A request for reduction of a civil penalty shall not toll the running of any time periods as provided in this Act.

(B) The agency shall hold an informal conference with the licensee on the issue of whether to reduce the civil penalty within fourteen (14) days of receipt of the request for reduction as provided in subsection (A).

(C) If assessment of the full civil penalty against a board and care home would be unjust and contrary to the purposes of the Act, the agency may reduce the civil penalty.

(D) The agency shall consider the following factors to determine whether the penalty would be unjust and contrary to the purposes of the Act, and to determine the extent of the penalty reduction:

(1) whether payment of the full civil penalty will substantially diminish the home's ability to make needed corrections;

(2) whether payment of the full civil penalty, after payment for needed corrections, will substantially diminish the home's capacity to continue to operate;

(3) the home's current and past diligence in correcting the violation; and

(4) the home's history of violations.

(E) In granting a licensee's request for reduction of a civil penalty, the agency shall impose as a condition upon reduction of the penalty the correction of all violations.

(F) The agency shall issue a written determination granting or denying the request for reduction of a civil penalty stating the findings in support of the determination. The determination shall be served upon the licensee personally or by certified mail.

COMMENT

The authority to request and grant reductions of civil penalty amounts is a necessary component of a civil penalty system setting fixed penalty amounts.[1] It clarifies that the agency is not bound to impose a fixed penalty amount if it would be unjust to do so.[2] The model act sets out general criteria for the reduction of the penalty amount. For example, the penalty amount may be reduced if a home has operated in good faith in the past and payment of the full penalty amount would prevent the home from making needed corrections, providing an adequate level of services to its residents, or continuing to operate. The penalty amount should be sufficient to deter future violations, yet also allow for completion of needed corrections. The agency is required in subsection (E) to condition the grant of a reduction upon correction of all violations in the home. This ensures that the monetary benefits derived by the licensee from reduction of the penalty are allocated to the completion of all corrections.

The procedures for submission and agency consideration of requests for reduction of civil penalties ensure fair and appropriate agency determinations. For several reasons, the agency is required in subsection (F) to issue a written determination stating the basis for its decision. First, it provides the licensee with notice of the decision. Second, requiring the agency to justify its decisions guards against arbitrary or erroneous decisions.[3] Third, written decisions establish precedent for future agency decisionmakers. Finally, a written decision constitutes a record if the licensee later contests denial of the reduction at the hearing to contest imposition of the civil penalty.[4]

1. Congress delegated an express mitigation power in 178 of the 197 fixed-penalty statutes analyzed in a recent law review article. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies,* 79 Colum. L. Rev. 1435, 1443 (1979).
2. *Id.*
3. Freedman, *Summary Action by Administrative Agencies*, 40 Chi. L. Rev. 1, 47 (1972).
4. Diver, *supra* note 1, at 1497.

Section 25.3. Treble Penalty for Repeated Violations.

A board and care home that violates a regulation or provision of the Act and that has had a sanction imposed against it for the same violation within two (2) years prior to issuance of the current inspection report shall be subject to a penalty three (3) times the amount provided in section 25.1.

COMMENT

This provision addresses the problems presented by licensees who repeatedly violate the same statutory or regulatory provision. Assessing a penalty three times the amount authorized for a first time violator communicates the necessity of permanently remedying the repeated violation. Several states provide for this penalty in their board and care statute's civil penalty provision.[1]

1. Ill. Ann. Stat. ch. 111½, §4153-305(8) (Smith-Hurd Supp. 1982-1983); Ky. Rev. Stat. §216.560 (3) (1982); Wis. Stat. Ann. §50.04(5) (West Supp. 1982).

Section 25.4. Payment of Penalties.

(A) A board and care home shall pay all penalties to the agency within ten (10) days after the home receives a final order imposing a civil penalty. The order imposing a civil penalty is final when the home has exhausted all opportunities to contest the penalty in accordance with the adjudication procedures as provided in section 6.

(B) If a board and care home does not correct all violations following issuance of a final order imposing a civil penalty:

(1) on the first day of each month the violations remain uncorrected, the agency shall serve a written demand for payment upon the home personally or by certified mail; and

(2) the home shall pay the penalty demanded within ten (10) days after it receives each written demand for payment.

(C) If a board and care home does not comply with subsection (A) or subsection (B), the agency shall file a court action to recover the penalty as provided in section 29.

COMMENT

Prompt payment and collection of penalties is an essential component of any civil penalty system.[1] For this reason, the model act requires the licensee to pay all penalties within ten (10) days of receipt of a final order imposing a civil penalty. If a violation remains uncorrected following issuance of a final order, the agency also is authorized to make periodic demands for payment.

The model act's civil penalty provision is unlike other civil penalty systems in that the agency has the power both to impose and assess the amount of a penalty against a noncompliant home.[2] The agency does not have, however, the power to collect delinquent penalties without the assistance of the judiciary.[3] For this reason, subsection (C) requires the agency to file an action for civil enforcement when a licensee fails to make timely payments.

In a few civil penalty systems, provision is made for allocation of collected penalties to agency efforts to enforce the law or correct deficiencies in particular areas of the regulated industry.[4] An analogous provision under the model act would allocate civil penalties collected to the receivership contingency fund. However, the constitutionality of such a provision may be questioned. The fourteenth amendment due process clause guarantees a trial before a disinterested and impartial judicial officer.[5] Adjudicatory systems that present even a possibility that the decisionmaker will fail to hold the balance between the state and the defendant fair, clear, and true have been found unconstitutional.[6]

Under a system allocating collected penalties to a receivership fund, there is a potential for agency self-interest in increasing the amount in the contingency fund by assessing higher civil penalties. Under the model act, however, this problem is minimized because the amount in the contingency fund provided in section 31.10 is determined by the legislature and disbursements from the fund are ordered by the court administering the receivership, rather than the agency. Further, in states whose board and care licensing agencies employ administrative law judges, the judge is independent of the agency and can maintain his or her impartiality. In states whose hearing officers are closely involved in agency enforcement activities, the impartiality of the decisionmaker could be seriously questioned. If a state chooses to include the allocation provision discussed above in its licensing law, any potential for bias should be carefully

examined.

Another commentator to the model act has suggested that civil penalties collected for a home's misuse or misappropriation of resident funds should be used to compensate residents of the home if they hve not been fully compensated for their loss.[7]

1. This section is adapted in part from Ill. Ann. Stat. ch. 111½, § 4153-310 (Smith-Hurd Supp. 1982-1983).
2. In 207 of 348 federal civil penalty statutes examined in a recent law review article, the power to assess penalties is conferred upon the courts rather than the agency. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies,* 79 Colum L. Rev. 1436, 1441 (1979).
3. *See* section 29 & comment, *supra.*
4. *See, e.g.,* Fair Labor Standards Act, 29 U.S.C. § 216(e). *See also* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 Colum L. Rev. 1254, 1286 (1966), suggesting that penalties collected under a proposed civil penalty system for housing code violations be used as a revolving fund for repairs under a receivership or other direct repair program.
5. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980).
6. *See Ward v. Monroeville,* 409 U.S. 57, 60 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927).
7. Letter from Beatrice Close, Deputy Director, New York Deputy Attorney General for Medicaid Fraud Control (October 13, 1983) (discussing first draft of model act).

SECTION 26. SUSPENSION OF ADMISSIONS.

The agency may suspend admissions to a board and care home on the following grounds:

(A) as a result of a violation of a regulation or provision of this Act, the home is unable to provide an adequate level of meals, lodging, and personal assistance to persons residing in the home at the time of the violation;

(B) a violation of a resident's rights as provided in section 10;

(C) the number of residents currently in the home exceeds the number of residents the home is licensed to serve;

(D) the home is operating without a license; or

(E) a violation of a regulation or provision of this Act results in conditions that present an imminent danger.

COMMENT

Suspension of admissions to a board and care home serves two important functions. First, if a board and care home is operating without a license or a violation in the home presents imminent danger, there is a strong policy argument for authorizing the agency to suspend admissions to the home. The state and the public have no assurances regarding the adequacy of conditions in an unlicensed home. Similarly, additional residents should not be placed in a home that has life-threatening violations.

Second, suspension of admissions to a board and care home can be an effective intermediate enforcement sanction. Unlike assessment of a civil penalty which may require additional steps to collect the penalty following its imposition, suspending admissions does not require further steps against the home by the agency. If the agency suspends admissions when a home is serving more residents than it is licensed to serve and simultaneously transfers residents, the agency can force the home to serve only the maximum number of persons it is licensed to serve. An order to suspend admissions also prevents a home from admitting new residents when it is unable to provide an adequate level of services to the residents currently residing in the home. In such a situation, if the agency simultaneously orders a transfer of residents or some residents leave the home voluntarily, the home can be in compliance with the act and meet the personal assistance needs of its residents. Moreover, if a board and care home is violating the rights of its residents and is not operating at its licensed capacity, an order to suspend admissions can prompt the home to comply with the act's resident rights provisions.

A few states limit suspension of admissions to situations presenting an imminent danger to resident health and safety.[1] The goal of the model act's enforcement sanctions, however, is to provide states with sanctions that can be used in a variety of situations and that can remedy non-life-threatening, as well as life-threatening violations.

Instead of authorizing temporary suspension of a home's license,[2] the model act authorizes suspension of admissions or transfer of residents immediately if violations result in conditions in a home that present an imminent danger. Suspension of a home's license temporarily rescinds its authority to operate, but may not result in a home discontinuing operation. The model act's suspension of admissions and resident transfer provisions, on the other hand, have the direct result of discontinuing the home's operation.

1. *See, e.g.,* Md. Health Code Ann. § 19-328 (Supp. 1982-1983), which gives the agency the option to suspend admissions only if life-threatening health or fire safety deficiencies exist.
2. While the model act does not specifically provide for temporary suspension of a home's license when violations which substantially threaten residents exist in the home, a significant number of state administrative procedure acts do contain such a provision. Under these statutes, the agency is authorized to order summary suspension of a license pending proceedings for revocation or other action if it finds that the public health, safety, or welfare requires emergency action and incorporates this finding into its order. This provision is based upon the Revised Model State Administrative Procedure Act, National Conf. of Commissioners on Uniform State Laws, § 14 (1961). *See, e.g.,* Ariz. Rev. Stat. Ann. § 41-1012 (Supp. 1983); Ark. Stat. Ann. § 5-712 (Supp. 1981); Conn. Gen. Stat. Ann. § 4-182 (West Supp. 1982); N.J. Stat. Ann. § 52:14B-11 (West 1981); Okla. Stat. Ann. tit. 75 § 314 (1976 & West Supp. 1982-83); Wis. Stat. Ann. § 227.01 (West 1982).) Section 6 of the model act incorporates state administrative procedure act adjudication procedures

into the act by reference. States in which the administrative procedure act contains a temporary license suspension provision may have that option in addition to the model act's authorization to order a suspension of admissions and transfer or residents if this section is construed as supplementing existing state laws.

SECTION 27. TRANSFER OF RESIDENTS.

Section 27.1. Grounds.

The agency may transfer residents from a board and care home to an alternative placement on the following grounds:

(A) as a result of a violation of a regulation or provision of this Act, the home is unable to provide an adequate level of meals, lodgings, and personal assistance to the persons residing in the home at the time of the violation;

(B) a violation of a resident's rights as provided in section 10;

(C) the number of residents currently in the home exceeds the maximum number of residents the home is licensed to serve;

(D) the home is operating without a license; or

(E) a violation of a regulation or provision of this Act results in conditions that present an imminent danger.

COMMENT

The resident transfer provision in the model act serves two functions.[1] First, it provides the agency with the power needed to transfer residents from a board and care home that is operating without a license or that has violations which present an imminent danger of death or serious physical harm to its residents.[2] It also serves as an intermediate enforcement sanction if a home is serving more residents than it is licensed to serve, is violating a resident rights provision, or is unable to provide an adequate level of meals, lodging, and personal assistance to its residents.

Examples of situations in which transfer of residents would be an appropriate enforcement sanction include overcrowding, understaffing, or insufficient kitchen and food storage facilities. As a result of these violations, a board and care home may be unable to meet the needs of its residents for meals, lodging, or personal assistance. Using the transfer procedures provided in section 27.2, the agency would identify the residents most appropriate for transfer and provide the assistance necessary to make each resident's transition a smooth one.

1. This section is adapted from Wis. Stat. Ann. § 50.03(5m) (West Supp. 1982).

2. Commission on Legal Problems of the Elderly, American Bar Association, *Model Recommendations: Intermediate Sanctions for Enforcement of Quality Care in Nursing Homes* 29 (July 1981).

Section 27.2. Assistance in Relocating.

(A) The agency and the resident's service coordinator shall make available assistance in relocating as provided in subsection (B) to any resident who:

(1) is being transferred under section 27.1;

(2) is being transferred as a result of an injunction issued under section 32;

(3) is being transferred as a result of a receivership ordered under section 31; or

(4) has requested assistance in moving to an alternative placement as provided in section 9.8.

(B) Assistance in relocating shall include the following:

(1) a resident shall be involved in planning his or her move and shall have the right to choose among available alternative placements; except that if a situation presenting an imminent danger makes prior involvement of the resident impossible, the agency and the resident's service coordinator may make a temporary placement until a final placement can be arranged;

(2) residents shall be provided with an opportunity to visit alternative placements before the move or following a temporary placement under paragraph (1);

(3) residents may choose their final alternative placement and shall be given assistance in moving to such placement;

(4) if the agency and the resident's service coordinator make or participate in making the decision to move to an alternative placement, consideration shall be given to the wishes of the resident and the proximity of the placement to the residents' relatives and friends;

(5) the resident, the agency, and the resident's service coordinator shall prepare a plan to assure a safe move and to protect the resident's health, safety, welfare, and rights before and during the move.

(C) A resident transfer under this section shall be consistent with the resident's board and care plan as provided in section 8.

(D) In any resident transfer conducted under subsections 27.1 (A), (B), (C), or (D), the agency shall provide prior written notice to the resident being transferred. The notice shall state the basis for the transfer and shall inform the resident of his or her right to contest the transfer in accordance with the adjudication procedures as provided in section 6. If the resident wishes to contest the transfer, he or she shall request a hearing within ten (10) days following receipt of the notice.

(E) In any resident transfer conducted under subsection 27.1(E), the agency shall provide written notice to the resident being transferred. The notice shall state

that the agency has issued an order to transfer residents from the home and to suspend admissions, and it shall be served personally upon the residents immediately following issuance of the order. The notice also shall inform the resident of his or her right to contest the transfer in accordance with the adjudication procedures as provided in section 6 following the transfer. If the resident wishes to contest the transfer, he or she shall request a hearing within five (5) working days following receipt of the notice.

COMMENT

If an individual has resided in a board and care home for an extended period and has developed stable relationships with other residents, a move to an alternative placement can be traumatic. This phenomenon has been verified by several studies in recent years.[1] For this reason, section 27.2 requires the agency to offer comprehensive relocation assistance to any resident who is being transferred by the agency under section 27.1, who must relocate as a result of a court order issued in an injunctive or receivership action, or who requests the assistance.[2] Relocation assistance helps the resident adjust to the move and assists the resident in finding an alternative placement.

A resident transferred under section 27.1 is given an opportunity to contest his or her transfer. Generally, the resident can contest the proposed transfer prior to leaving the home. If conditions in a home present an imminent danger, however, the resident receives notice of the transfer immediately following issuance of the order to transfer residents and his or her opportunity to contest the transfer is delayed until after the transfer has occurred.

A resident transfer under this section need not be to another board and care home. Alternative placements should be chosen based upon the resident's wishes and needs. They include transfers to independent living arrangements, residential treatment facilities, nursing homes, or any other appropriate residential setting.

1. Studies of elderly persons transferred from one nursing home to another have demonstrated increased dissatisfaction levels and significant declines in physical and mental health. Miller & Lieberman, *The Relationship of Affect State and Adaptive Capacity to Reactions to Stress,* 20 J. Gerontology 492 (1965); Lawton & Yaffee, *Mortality, Morbidity and Voluntary Change of Residence by Older People,* 18 J. Am. Geriatrics Soc'y. 823 (1970); *Effects of Enforced Relocation on Life Adjustment in a Nursing Home,* 6 Int'l J. Aging Hum. Dev. 249 (1975) *cited in* Comment, *Involuntary Relocation of Nursing Home Residents and Transfer Trauma,* 24 St. Louis U.L.J. 758, 759 (1981). Although the residents of board and care homes are not as physically dependent as those in nursing homes, an analogy might be made to the emotional and psychological impact of transfer upon elderly and disabled persons in nursing homes. Both Illinois and Wisconsin extend nursing home transfer protections to board and care home residents in their licensing laws. Ill. Ann. Stat. ch. 111½, §§ 4153-415 to -423 (Smith-Hurd Supp. 1982-1983); Wis. Stat. Ann. § 50.03(5m) (West Supp. 1982).

2. Approximately nine (9) states provide for transfer of residents in their board and care licensing legislation, but only Illinois and Wisconsin include a comprehensive statutory scheme to address the problems incident to resident transfers. Ill. Ann. Stat. ch. 111½, §§ 4153-415 to -423 (Smith-Hurd Supp. 1982-1983); Wis. Stat. Ann. § 50.03(5m) (West Supp. 1982).

SECTION 28. REVOCATION OR NONRENEWAL OF LICENSE.

The agency may revoke or refuse to renew the license of a board and care home on the following grounds:

(A) a violation of a regulation or provision of the Act results in conditions that present an imminent danger or a substantial probability of death or serious physical harm to residents of the home;

(B) a violation of a resident's rights as provided in section 10;

(C) a criminal conviction of the licensee or administrator for an offense specified in section 38 during the term of the home's license;

(D) obtaining or attempting to obtain or retain a license by fraudulent means, misrepresentation, or by submitting false information;

(E) insolvency of the home;

(F) failure to comply with a final order of the agency to correct a violation of a regulation or provision of the Act for which an administrative sanction has been imposed; or

(G) failure to comply with a final order of the agency imposing an administrative sanction.

COMMENT

Delicensing is a particularly harsh administrative sanction. It deprives a board and care home licensee of his or her livelihood and necessitates transfer of a home's residents.[1] It is also administratively cumbersome for the agency, often involving lengthy appeals.[2] Many state board and care home licensing laws authorize license revocation or nonrenewal for substantial failure to comply with statutory requirements, or for a violation of any statutory provision.[3] If delicensing is the only enforcement sanction provided in the legislation, it may be wise to permit its use for any violation. If other intermediate enforcement sanctions are available, however, delicensing should be used only for the most serious violations or after intermediate sanctions have failed to prompt necessary corrections. For these reasons, the model act limits the grounds for delicensing. This limitation is consistent with the model act's providing criminal penalties only for serious violations.[4]

Although delicensing is not appropriate in all situations, the existence of certain violations requires this drastic enforcement action. Conditions in a home that present an imminent danger or a substantial probability of death or serious harm are in direct opposition to the act's purpose of providing a safe environment for board

and care home residents. Violations of a resident's rights seriously undermine the act's goal of encouraging individual autonomy. Moreover, a board and care home licensee or administrator who meets the grounds specified in subsections (C) through (E) is unqualified to operate a home and should be subject to license revocation or nonrenewal.

Subsections (F) and (G) authorize the agency to delicense a home for failure to comply with intermediate enforcement actions taken against it.[5] Unsuccessful attempts to remedy substandard conditions in a home or impose conditions upon a home's operation through the imposition of intermediate enforcement actions indicate that a home should not be operating. Delicensing is an appropriate response to this situation. Moreover, a home will be more likely to comply with a final order to correct violations or a final order imposing a sanction if it knows that its license may be revoked for failure to comply with that order.

1. Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement*, 57 N.C.L. Rev. 1317, 1347 (1979).
2. Butler, *supra* note 1, at 1347; Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1436 (1979).
3. N.J. Stat. Ann. § 26:2H-13 (West Supp. 1982); N.Y. Soc. Serv. Law § 460-D(4)(a) (McKinney Supp. 1981-1982); Kan. Stat. Ann. § 39-931 (1981); Wyo. Stat. § 35-2-105(c) (1977 & Supp. 1982); Nev. Rev. Stat. § 449.160 (1981).
4. *See* section 38 & comment, *infra*.
5. This language is adapted from N.J. Stat. Ann. § 55:13B-10(a), (c) (West Supp. 1982). An agency order becomes final once a home has exhausted its opportunity to contest the validity of the order.

SECTION 29. CIVIL ENFORCEMENT OF FINAL AGENCY ORDERS.

Section 29.1. Agency Authority to File for Civil Enforcement.

In addition to other remedies provided by law, the agency may seek enforcement of its final orders by filing an action for civil enforcement in a court of competent jurisdiction.

COMMENT

A mechanism for judicial enforcement of final agency orders is a necessary component of the model act.[1] If a home fails to comply with a final agency order imposing a sanction, the agency does not have the power to enforce compliance and must seek court enforcement.[2] The judiciary has remedies for the enforcement of rights and duties under broad grants of statutory and common law jurisdiction that enable it to fill in the gaps in administrative powers necessary to enforce the policies committed to agency discretion.[3]

1. Similar provisions appear in federal law. *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. § 660(b) (1975) & Mine Safety and Health Act, 30 U.S.C. § 816(b) (Supp. 1983). An agency order becomes final if a home fails to contest an order imposing an administrative sanction, or obtains an unfavorable decision following an administrative hearing and does not petition for judicial review.
2. *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 321 (6th Cir. 1975) interpreting an Occupational Safety and Health Act (OSHA) provision for summary enforcement of final OSHA orders assessing a civil penalty. *See also ICC v. Brimson*, 154 U.S. 447 (1894); *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3rd Cir. 1973); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123-124 (3rd Cir. 1981).
3. L. Jaffee, *Judicial Control of Administrative Action* 119 (1965).

Section 29.2. Defenses.

In any enforcement proceeding brought under section 29.1, the respondent may assert only the following defenses:

(A) the invalidity of the relevant provision of the Act;

(B) the inapplicability of the order to respondent;

(C) that the order is not final; or

(D) that respondent has corrected all violations, except that a respondent who establishes this defense is not necessarily relieved from any sanction imposed under this Act.

COMMENT

Section 29.2 limits the scope of judicial review in civil enforcement actions to certain enumerated defenses.[1] Because the agency's authority to seek civil enforcement is restricted to its final orders, the home already will have had an opportunity to litigate questions of fact relating to the existence of the violation and the propriety of the sanction that has been ordered. The only questions remaining in an enforcement action address the validity of the underlying statute, the applicability of the order to the home, the finality of the order, and the home's compliance with the order.

Federal courts examining the appropriate scope of review in the context of Occupational Safety and Health Act and Internal Revenue Service orders have limited review to a determination of the propriety of enforcement, rather than relitigation of the facts generating the order.[2] Subsection (D) clarifies that a home which admits a past violation and demonstrates subsequent compliance is not necessarily relieved from that part of the order imposing a sanction for failure to make timely correction of the violation.

1. This section is adapted from Fla. Stat. Ann.§ 120.69(5) (West 1982) and Revised Model State Administrative Procedure Act, National Conf. of Commissioners on Uniform State Laws § 5-203 (1981).
2. *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 322-23 (6th Cir. 1975); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 125 (3rd Cir. 1981).

Section 29.3. Relief.

In any enforcement proceeding brought under section 29.1, the court may grant any civil remedy provided by law.

COMMENT

This section reflects the traditional authority of the judiciary to use a broad range of procedures and remedies for the enforcement of rights and duties.[1]

1. L. Jaffee, *Judicial Control of Administrative Action* 119 (1965).

SECTION 30. NOTICE TO PLACEMENT AGENCIES OF ORDERS TO IMPOSE AN ADMINISTRATIVE SANCTION.

(A) Except as provided in subsection (B), the agency shall provide written notice of a final agency order imposing an administrative sanction to:

(1) all public or private agencies involved in placement or referral of persons to board and care homes; and

(2) any other appropriate federal, state, or local agency.

(B) If an agency order to immediately suspend admissions or immediately transfer residents is imposed, the notice shall be provided to the agencies listed in subsection (A) pending a hearing to contest the order.

(C) The notice provided in subsection (A) and (B) shall be in writing and shall state:

(1) the name and address of the board and care home;

(2) the uncorrected violation that prompted imposition of the sanction;

(3) the sanction imposed; and

(4) if the notice is of an order to immediately suspend admissions or immediately transfer residents, that a hearing to contest the order is pending.

(D) The agency shall provide written notice to the agencies listed in subsection (A) when a previously imposed sanction has been lifted.

(E) The notice provided in subsection (D) shall be in writing and shall state:

(1) the name and address of the board and care home;

(2) the date of the notice issued under subsection (A) or (B);

(3) the sanction that has been lifted; and

(4) the date the sanction was lifted.

COMMENT

This section is intended to provide agencies involved in the placement or referral of board and care home residents with information needed to make informed placement decisions. Notification of placement agencies is also a necessary component of successful implementation of an agency order suspending admissions to a board and care home.

Delaying notice of a violation of the act until an order imposing a sanction is final protects a home that has made timely correction of violations or has had a sanction erroneously or arbitrarily imposed against it. Orders immediately suspending admissions or transferring residents, however, are issued pending a hearing to contest the order because conditions in the offending home are so deficient that admissions should be immediately suspended. The licensee is assured that placement and referrals into the home will resume soon after corrections are made by subsection (D)'s subsequent notification requirement.

SECTION 31. RECEIVERSHIP.

The remedy of receivership originally arose out of the equitable powers of the chancery courts of England.[1] Since the early development of this equitable remedy, statutory provisions also have authorized courts to appoint receivers.[2] A receivership has been regarded historically as one of the most drastic remedies because of the direct control the receiver is given over the property of the respondent.[3]

Traditionally, the primary purpose of the appointment of a receiver, whether authorized by statute or by the court's equitable power, is to take custody of the respondent's property and preserve it pending final disposition of litigation.[4] More recently, statutory authorizations of receivership in the areas of housing and nursing home regulation have expanded the role of a receiver to include the responsibility for correcting conditions that violate state standards.[5]

One commentator analyzing the use of receiverships to regulate nursing homes identified three goals which are also applicable to the use of receiverships to regulate board and care homes.[6] The first goal is protecting the health, safety, and welfare of the residents, as when a home threatens to close without making adequate arrangements for transfer of residents or without considering the effects of transfer trauma on its residents. In these instances, the receiver operates the facility until an orderly transfer of all residents can be completed or ownership of the facility can be transferred.[7]

The second goal is the same as the primary objective of a traditional receivership, namely, to conserve the respondent's property until the final outcome of the litigation. For example, in an action for damages brought by residents against a home alleging fraudulent mishandling of resident's funds, a receiver might be appointed by

the court to administer the funds until final disposition of the case.[8]

The third goal is rehabilitation of the facility so that it meets state standards; this goal requires the expansion of the traditional powers and duties of the receiver. The expansion of these powers and duties begins to intrude upon the property interest of the respondent to the extent that a receiver is permitted to make additions or corrections to the physical structure of a home. The policy argument in favor of using receivers to rehabilitate nursing homes is that the shortage of adequate homes discourages closing the homes if alternate means of upgrading the facilities are available.[9] This argument is equally applicable in those states in which there are inadequate numbers of board and care homes. Sanctions for violations of licensing standards are aimed at rehabilitation of homes, but the appointment of a receiver has the greatest potential for actually remedying the deficient conditions in a home since a receiver may be charged with the responsibility for upgrading the facility.[10]

Recognizing that the goal of rehabilitation of a facility may intrude upon a respondent's ownership rights, the model act has attempted to minimize the intrusion by requiring court approval of a plan for correction of deficiencies costing in excess of $1,000[11] and making monies available to pay the cost of implementing the plan, if necessary.[12]

1. 1 R. Clark, *A Treatise on the Law of Receivers,* §§ 16, 18 (3d ed. 1959).
2. *Id.* at § 16. Statutory receivership provisions may either codify the "usages and rules of equity pertaining to such appointment" or enlarge upon those rights. *Id.*
3. *Id.* at § 58 which states: "an injunction interferes with the action of the defendant in relation to his property or otherwise, and the appointment of a receiver interferes with control and possession of the property of the defendant by forcing him to turn it over to the receiver."
4. *Id.* §§ 19, 24.
5. *See, e.g.,* N.Y. Mult. Dwell. Law § 309 (McKinney 1981-1982) (housing); Brown, *An Appraisal of the Nursing Home Enforcement Process,* 17 Ariz. L. Rev. 304, 340 (1975). *E.g.,* Kan. Stat. Ann. § 39-959(d) (Supp. 1981); Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement,* 57 N.C.L. Rev. 1317 (1979).
6. Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 688, 691 (1981).
7. Most receivership provisions regulating nursing homes specifically state that closure of the facility without adequate arrangements for transfer of residents is a ground for appointment of a receiver. *E.g.,* Wis. Stat. Ann. § 50.05(2)(d) (West Supp. 1982); Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695, 709 (1980-81); Johnson, *supra* note 6, at 688.
8. Appointment of a receiver can be used as a provisional remedy pending final relief. Brown, *supra* note 5, at 340.
9. Johnson, *supra* note 6, at 688, who states that,
   > Because of the significant difficulties associated with facility closing, the statutes should tip the balance toward improving the facility. This weighing is justifiable even against the property interest of the owner of a substandard facility. The cost of operating a facility in compliance with standards, as opposed to operating in violation of standards, is a cost of doing business imposed by law. The imposed standards represent neither a discretionary use of funds by the owner nor a reallocation of "profit." The cost of rehabilitating a facility, therefore, should not be a violation of the traditional duty of a receiver to conserve the assets entrusted to him by the court.
10. Brown, *supra* note 5, at 340.
11. *See infra* section 31.7.
12. *See infra* section 31.10.

Section 31.1. Who May Petition.

The agency, the attorney general, an advocate, a resident, or the licensee may petition a court of competent jurisdiction to appoint a receiver to operate a board and care home.

COMMENT

By including residents and advocates as persons who may petition the court for a receiver, the model act is departing from the procedures of a number of state health care facility receivership provisions that permit only the licensing agency or the attorney general acting on behalf of the agency to petition for a receiver.[1] A number of problems with receivership provisions that permit only the agency to petition the court for appointment of a receiver have been identified, most notably, the infrequent use of receiverships by agencies.[2]

The residents of board and care homes may be the most suitable petitioners in a receivership proceeding since they have first-hand knowledge of the conditions in the home and are the most likely to incur injury as a result of those conditions.[3] In some cases, residents may be unwilling or unable to act on their own behalf to seek the appointment of a receiver. At other times, the substandard conditions of a particular home may affect more then one resident or even more than a single board and care home. In either of these cases, it would be appropriate for an advocate to petition the court for appointment of the receiver.

Permitting a licensee to petition a court for appointment of a receiver for that home creates, in effect, voluntary receivership. Under this section, a licensee who, because of sudden illness or other reasons, is unable to discharge his or her responsibilities under the act may petition the court for a receiver to operate the home.

1. *See, e.g.,* Iowa Code Ann. § 135C.30 (West 1972 & Supp. 1982-83) (the commissioner of state agency may petition); Ariz. Rev. Stat. Ann. § 36-429 (1974 & Supp. 1982-83) (the director of state agency may file petition); Utah Code Ann. § 26-20-10 (1979 & Supp. 1981) (county attorney may file petition); Kan. Stat. Ann. § 39-954 (1981) (agency, owner, or licensee may file); Wis. Stat. Ann. § 50.05(4) (West Supp. 1982) (the secretary of the state agency); N.Y. Soc. Serv. Law § 461f (McKinney Supp. 1981-1982) (the department or the commissioner). But an Illinois statute allows residents to file receivership petitions. Ill. Ann. Stat. ch. 111½, § 4153-503 (Smith-Hurd Supp. 1982-1983).
2. Butler, *Nursing Home Quality of Care Enforcement Part II - State*

Agency Enforcement Remedies, 14 Clearinghouse Rev. 668, 674-76 (1980).

3. *See* Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 688, 691 (1981), in which these factors are identified as arguments in favor of designation of nursing home residents as petitioners in receivership actions. Ms. Johnson also points out that the argument against permitting residents to petition for appointment of receivers, i.e., that it will be an instrument for harassment of the owner-operator, is diminished by the dependent relationship the resident may have with the operator and the resident's fear of the operator's retaliation.

Section 31.2. Grounds.

The court may appoint a receiver upon the filing of a petition or *sua sponte* in any pending action for one or more of the following grounds:

(A) a violation which results in conditions that present a substantial probability of death or serious physical harm to residents or staff;

(B) the home is operating without a license;

(C) the license of the home has been suspended or revoked or the home is closing or intends to close and adequate arrangements for relocating residents have not been made;

(D) the procedures for nonrenewal or revocation of the home's license have been initiated and violations in the home result in conditions that present an imminent danger;

(E) insolvency;

(F) a previous court order has been issued requiring respondent to act or refrain from acting and respondent has failed to comply with the court order;

(G) upon request of the owner-operator or licensee of the home; or

(H) misdealing or fraud in the handling of resident funds.

COMMENT

The model act lists eight grounds upon which a court may appoint a receiver. The first five are grounds most often specified in state receivership provisions.[1] The last three have been added to permit the court to use receivership as a remedy when a licensee has violated prior court orders, to permit voluntary receiverships, and to allow a receiver to be appointed when residents' funds have been mishandled or abused.

Although most courts possess jurisdiction over actions in equity to appoint receivers, the grounds for appointment are generally narrow.[2] Statutes broadening the authority of state courts to appoint receivers have been enacted in a number of substantive areas including housing code enforcement.[3] Similarly, the model act expressly authorizes a court to appoint a receiver in situations that may not be authorized by its equity jurisdiction, depending upon the case law or statutes of a particular state.

Enumeration in the model act of several grounds for appointment of a receiver was chosen as a middle ground between reliance on a single narrow ground and delegation of broad discretion to the state court. On the one hand, reliance on a single ground for appointment of a receiver, such as only when a facility's license has been revoked,[4] is too narrow. Limiting the court's authority to appoint a receiver to one instance ignores other situations in which the remedy of a receiver should be available.

On the other hand, delegating broad discretion to a court by stating that a court may appoint a receiver whenever it determines it necessary may be superfluous, since such authority resides in the equitable powers of the court.[5] In addition, a statute that delegates broad discretion to a court fails to direct the court as to when it should exercise that authority.[6] As one commentator pointed out, delegation of general authority to appoint a receiver may not expand the use of the remedy because the court will continue to rely on the historical limitations in deciding whether a receiver should be appointed.[7] By listing seven specific grounds for appointment of a receiver, it is intended that the equitable jurisdiction of the court to appoint a receiver will be enlarged by directing the court as to situations in which appointment of a receiver should be considered.

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1. *See, e.g.,* Ill. Ann. Stat. ch. 111½, § 4153-501 (Smith-Hurd Supp. 1982-83); Mo. Rev. Stat. §§ 198.099, 630.768 (Supp. 1982); Ind. Code Ann. § 16-10-4-20 (Burns Supp. 1982). Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695,709 (1980-81).

   Note that in the above statutes the grounds are listed as those upon which a petitioner may seek appointment of a receiver. In order to avoid the possible ambiguity between when a petitioner may seek appointment and when a court may appoint, the model act has used the latter language.

2. 1 R. Clark, *A Treatise on the Law of Receivers* § 16 (3d ed. 1959).

3. *See, e.g.,* Conn. Gen. Stat. Ann. § 19-341b (West 1977 & Supp. 1982); N.Y. Mult. Dwell. Law § 309(g) (McKinney Supp. 1981-82).

4. *See, e.g.,* Utah Code Ann. § 26-20-10 (1976 & Supp. 1981).

5. Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 686 (1981) which in reference to similar language in a Minnesota statute, states:

   > This requirement is too narrow. Even if one accepts the underlying presumption that receiverships are reserved for situations in which the continued existence of the facility is in imminent danger, the statute ignores similar situations that threaten the facility with closing such as declassification of participation in federal reimbursement programs. This type of decertification occurs in a number of situations including when an operator decides to close the facility voluntarily, or when a facility faces insolvency or bankruptcy. In both situations the threat of closing may cause the residents to suffer transfer trauma. If there is time to plan for new ownership and administration, the facility also may be retained in the original neighborhood. In either case, a receivership would be a useful way to ensure that the closing is not precipitous.

6. An example of a receivership provision that delegates broad discretion to a court for appointment of a receiver is N.J. Stat. Ann. § 26-2H-38 (West Supp. 1982).

7. Johnson, *supra* note 5, at 687, which states:

> Although it would appear that the New Jersey approach could allow receiverships in more cases and allow the courts greater flexibility, the historical limitations to the doctrine of equitable receivership may guide New Jersey courts to an even more limited use of the receivership provision. . . .

Section 31.3. Procedures for Appointment.

The procedure for petitioning a court for an appointment of a receiver, including service of process, shall be in accordance with the [state] rules of civil procedure. In addition:

(A) If personal service of a copy of the petition cannot be made with due diligence upon the respondent, service may be made upon the respondent by posting a copy of the summons and petition in a conspicuous place within the board and care home, and sending a copy of the summons and petition to the respondent by registered mail at his last known address. Service shall be complete upon filing a return of service with the clerk courts.

(B) If it appears from the petition, affidavits, or testimony of witnesses under oath that there is probable cause to believe that violations in the home are resulting in conditions that present an imminent danger, the court shall order ex parte the appointment of a receiver. Notice of the petition and order shall be served on the respondent and any other parties to the case within twenty-four (24) hours after issuance of the order. A hearing on the petition shall be held within three (3) days after notice is served or posted unless the respondent agrees to a later date. After the hearing, the court may terminate, continue, or modify the temporary order.

COMMENT

Section 31.3 of the model act provides that procedures for obtaining a receivership shall be the same as procedures for bringing any civil action under the state's rules of civil procedure with two exceptions.

First, an exception to the usual requirements of personal service is made to permit a licensee to be served by posting a copy of a petition in a conspicuous place in the home if the petitioner has not been able with due diligence to obtain service upon the respondent by the usual methods.[1] Permitting service of a complaint by posting a copy at a home has been used in regulating housing and nursing homes.[2] Since some agent or employee of the licensee should be on the premises at all times, the posting of the petition, combined with mailing a copy by registered mail, is sufficient under most circumstances to notify the licensee of the pending request for appointment of a receiver.

Under section 17.9 of the model act, the licensee must notify the agency of any change in his or her address. Since inspection reports and other documents are available for public inspection, a petitioner should have little trouble obtaining the current address of the licensee unless the licensee has failed to notify the agency.

The second exception to the rules of civil procedure is to permit a court to appoint a receiver in emergency situations pending a hearing on that appointment. This procedure for *ex parte* appointment of a receiver is based upon a provision Wisconsin's nursing home and community residential facility licensing.[3]

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1. Fed. R. Civ. P. 4 sets out the requirement for personal service of a complaint upon a defendant. States that pattern their rules of civil procedures after the federal model will generally set out the requirements for personal service in their Rule 4. *E.g.*, Ohio R. Civ. P. 4.

2. *See, e.g.*, N.Y. Mult. Dwell. Law § 309.C.1 (McKinney 1974 & Supp. 1982-83) (regulation of housing statute which states that, "If any such owner, mortgage, or lienor cannot with due diligence be served personally within the city where the property is located and within the time fixed in such order, then service may be made on such persons by posting a copy thereof in a conspicuous place on the premises where the nuisance exists, and by sending a copy thereof by registered mail, return receipt requested, to the owner at the last address registered by him with the department . . ."). Ill. Ann. Stat. ch. 111½, § 4153-504 (Smith-Hurd Supp. 1982-83). (Regulation of community living facilities which states that, "The petition and notice of the hearing shall be served on the owner, administrator or designated agent of the facility as provided in the Civil Practice Act, or the petition and notice of hearing shall be posted in the facility not later than three days before the time specified for the hearing. . .").

3. Wis. Stat. Ann. § 50.05(5) (West Supp. 1982) which provides:
> *Emergency procedure.* If it appears from the petition filed under sub. (4), or from an affidavit or affidavits filed with the petition, or from testimony of witnesses under oath when the court determines that this is necessary, that there is probable cause to believe that an emergency exists in the facility, the court shall immediately issue the requested order for appointment of a receiver, *ex parte* and without further hearing. Notice of the petition and other shall be served on the operator, administrator, or designated agent of the facility as provided under ch. 801 or shall be posted in a conspicuous place in the facility within 24 hours after issuance of the order and a hearing on the petition shall be held within three days after notice is served or posted unless the operator consents to a later date. After the hearing, the court may terminate, continue or modify the temporary order.

Section 31.4. Receiver Qualifications.

The court shall appoint as a receiver one or more responsible and qualified persons, except that the following individuals shall not be appointed:

(A) any of the parties to the action, any employees, agents, or any persons related by blood or marriage to the parties to the action;

(B) the agency or representative of the agency; except that if no qualified individual is willing to be appointed as a receiver and the agency does not object to it appointment, the court may appoint the agency as the receiver.

COMMENT

In order to preserve the traditional role of the receiver as an impartial officer of the court, parties to the action are excluded from appointment as the receiver.[1] A number of statutes permit the agency or its representative to be appointed as a receiver.[2] Presumably, the agency has the expertise to administer the home as a receiver. However, the model act discourages the appointment of the agency as a receiver for four reasons: (1) the agency is susceptible to political pressure; (2) the prospect of being appointed receiver might deter it from petitioning for appointment; (3) control of a home by the agency is extremely intrusive; and (4) the responsibilities of receiverships might detract from the agency's potential role in developing support for the continued operation of the facility.[3] Nevertheless, when a person qualified to act as a receiver cannot be located, the agency may be appointed as a last resort.

Historically, one single individual was appointed as a receiver and the use of more than one person as a receiver, known as co-receivers, was discouraged.[4] However, in part because of the difficulty in obtaining a single qualified person to act as a receiver for a home, recent practice suggests that a coalition of interested persons and groups in the community can be effective as co-receivers.[5]

1. 1 R. Clark, *A Treatise on the Law of Receivers* §§ 34-35 (3d ed. 1959). Most statutes prohibit the owner, operator, or licensee of the home from being appointed. *See, e.g.,* N.J. Stat. Ann. § 26-2H-42 (West Supp. 1982).
2. Wisconsin's statute regulating community-based residential facilities permits the secretary of the state agency or its designee to be appointed as a receiver. Wis. Stat. Ann. § 50.05(4) (West Supp. 1982).
3. Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 700 (1981).
4. R. Clark, *supra* note 1.
5. Johnson, *supra* note 3, at 701-05.

Section 31.5. Purchase of Home by Receiver Prohibited.

Ownership of the respondent home shall not be transferred to the receiver or its employees, agents, or relatives during the pendency of the receivership, or within six (6) months of the termination of the receivership; except that the ownership of the respondent home may be transferred to the state or agent of the state notwithstanding that the agency has been appointed as the receiver for the home.

COMMENT

Section 31.5 of the model act prohibits the receiver, except for the agency, from purchasing the home under receivership either during the receivership or within six (6) months of its termination. This provision is in direct contrast to the use of receivers in regulating nursing homes in which the potential future purchase of the home is sometimes used as an inducement to an individual to act as a receiver.[1]

The model act prohibits the purchase of a home by a receiver because the possibility that a receiver could be a future purchaser of a home, particularly during the pendency of the receivership, conflicts with the receiver's role as a disinterested party.[2] Some receivers who wish to purchase the home in the future may fail to improve conditions in a home, since such improvements might increase the purchase price, even though others may be motivated to improve the home in order to purchase a home in compliance.

Generally, a receiver could be helpful in determining a fair purchase price for the home in the event that it must be sold because the receiver will be knowledgeable about the home's assets and liabilities. If the receiver is allowed to purchase the home, his or her fair determination of the market value of the home is undermined by the potential for bias.

1. Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 710 (1981).
2. 1 R. Clark, *A Treatise of the Law* 45 (3d ed. 1959) which states:

> A receiver should be disinterested as between the administration of the receivership property and his own property and his own private interests. He cannot make any profit out of his trust other than his compensation which the court may allow him under the law. He cannot deal with receivership property for his individual benefit while he is receiver, and if he does so the benefit must inure to the trust estate...

See also Johnson, *supra* note 1, in which it was stated:

> JHHA was the ideal receiver in terms of the skills it brought to the task and also in terms of the pressure it exerted through its clear refusal to become the permanent operator....In the case of the Village Nursing Home, the eventual permanent operators learned from JHHA and inherited the foundation for a well-run facility.

Section 31.6. Powers and Duties of Receiver.

A receiver appointed under this section:

(A) may exercise those powers and shall perform those duties set out by the court;

(B) shall operate the home in compliance with this Act and assure the safety of the residents and the delivery of services to them;

(C) shall have the same rights to possession of the building in which the home is located and of all goods and fixtures at the time the petition for receivership is filed as the licensee would have had if the receiver had not been appointed. The receiver shall take such action as is necessary to protect or conserve the assets or property of which the receiver takes possession, or the proceeds of any transfer thereof, and may use them only in the performance of the powers and duties set forth in this section and by order of the court;

(D) may use the building, fixtures, furnishings, and any accompanying consumable goods in the provision of care and services to residents and to any other persons receiving services from the home at the time the petition for receivership was filed. The receiver shall collect payment for all goods and services provided to residents or others during the period of the receivership at the same rate and method of payment as was charged by the licensee at the time the petition for receivership was filed, unless a different rate is set by the court;

(E) may correct or eliminate any deficiency in the structure or furnishings of the home that endangers the safety or health of residents while they remain in the home, provided the total cost of correction does not exceed $1,000;

(F) shall submit to the court a plan as provided in section 31.7 of this Act for correction or elimination of any deficiency in the structure or furnishings of the home that endangers the safety or health of residents while they remain in the home, if such corrections are estimated to exceed $1,000, and shall carry out the plan with any modification as approved by the court;

(G) may let contracts and hire agents and employees to carry out the powers and duties created under this section;

(H) except as specified in section 31.8, shall honor all leases, mortgages, and secured transactions governing the building in which the home is located and all goods and fixtures in the building of which the receiver has taken possession, but, in the case of a rental agreement, only to the extent of payments that are for the use of the property during the period of the receivership, or, in the case of a purchase agreement, come due during the period of the receivership;

(I) shall have full power to direct, manage, and discharge employees of the home, subject to any contract rights they may have;

(J) if transfer of the residents is necessary, shall cooperate with the agency in carrying out the transfer of residents to an alternative placement as provided in section 26; and

(K) shall be entitled to and shall take possession of all property or assets of residents in the possession of the licensee or administrator. The receiver shall preserve all property, assets, and records of residents of which the receiver takes possession and shall provide for the prompt transfer of the property, assets, and records to the alternative placement of any transferred resident.

COMMENT

With the exception of subsection (F), the foregoing powers and duties correspond to the powers and duties of receivers in statutes regulating nursing homes and other residential facilities.[1] Generally, the powers and duties listed are those that the receiver will need in order to fulfill the goals of the receivership, namely, providing for the health, safety, and welfare of the residents, preserving the assets of the home pending litigation, and correcting deficient conditions in the home.

Powers and duties of a receiver can be classified into five general categories: (1) those stated expressly in the order of the court; (2) those which are implied from the order of the court; (3) those conferred by statute; (4) those conferred by case law; and (5) those that the receiver must adhere to because of his or her role as the caretaker of the respondent's property and an officer of the court.[2] Actions outside of the authority conferred upon the receiver from one of the above sources would be *ultra vires* and may subject the receiver to liability.[3] The purpose of enumerating the powers in the model act is to define the role of the receiver broadly enough so that the receiver has sufficient power to carry out the purposes of the receivership.

Most commentators agree that once a qualified person is appointed as a receiver, that person should be given broad authority to take whatever action is necessary to implement the goals of the receivership.[4] The only exception to this general rule in the model act is the limitation upon the receiver's authority to correct deficiencies without the approval of the court to remedies costing less than $1,000.[5]

1. This section is adapted from Wis. Stat. Ann. § 50.05(7) (West Supp. 1982-83), and Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695 (1980-81).
2. 2 R. Clark, *A Treatise on the Law of Receivers,* § 355 (3d ed. 1959).
3. *Id.*
4. Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 692 (1981).
5. *See* section 31.7 and comment, *infra.*

Section 31.7. Plan for Correction of Deficiencies in Excess of $1,000.

(A) If the receiver determines that it is necessary to correct a deficiency estimated by the receiver to cost in excess of $1,000, the receiver shall submit to the court a written plan that contains the following:

(1) a description of the deficiency that requires correction;

(2) a description of the method proposed by the receiver for correction of the deficiency; and

(3) an estimate of the cost of the correction.

(B) A copy of the plan shall be served upon the petitioner and the respondent within three (3) days after the submission of the plan to the court.

(C) Upon the written request of a party within seven (7) days after submission of the plan to the court, a hearing on the proposed plan of correction shall be held. If a hearing is requested by a party, the hearing

shall be held within fourteen (14) days of the written request. The petitioner, respondent, and receiver shall have the opportunity to present evidence at the hearing regarding the proposed plan. Upon hearing the evidence, the court may approve the plan, modify the plan, or, if the court determines as a result of the evidence that the alleged deficiency does not require correction, it may reject the plan.

(D) If no party requests a hearing on the plan, the court may order the receiver to proceed to implement the plan.

(E) Upon written petition, affidavits, and any other evidence submitted to the court showing that violations in the home have resulted in conditions that present an imminent danger, the court may approve *ex parte* a written plan of the receiver to correct a deficiency of the home. Notice of the plan and the *ex parte* order shall be served upon the parties within twenty-four (24) hours after issuance of the *ex parte* order approving the plan. A hearing on the plan shall be held within three (3) days after service of the notice. Upon hearing the evidence presented at the hearing, the court may continue, modify, or reject further implementation of the written plan.

COMMENT

As discussed in the comment to previous sections, one of the goals of receivership in the model act is rehabilitation of the home. Recognizing that the correction of deficiencies often requires expenditure of funds, either of the licensee or from the contingency fund, the model act requires that the court approve expenditures of funds in excess of one thousand dollars ($1,000) to correct deficiencies after a hearing at which both the petitioner and the respondent have an opportunity to present evidence. Although, traditionally, receivers have been allowed to make repairs to a property consistent with the duty to preserve that property, it is also true that receivers are encouraged to apply to the court for authority to make repairs or improvement to the property that will incur expenses against the estate.[1]

In addition, rehabilitation of the home might result in alterations to the physical structure resulting in an even greater intrusion upon the property rights of the respondent. Permitting the respondent an opportunity to be heard prior to the court's decision to approve, modify, or reject the plan offers the respondent more protection than if the receiver were authorized to proceed without court involvement.

Some statutes have minimized this intrusion on the property rights of the respondent by prohibiting the receiver from making any correction or alteration of the physical structure in excess of a certain monetary amount.[2] However, there may be instances when necessary corrections to the home, such as the installation of a residential sprinkler system, may result in physical alterations to the home in excess of the amount specified in the statute. This section of the model act sets out a procedure that allows a plan for such corrections to be proposed, while at the same time protecting the due process rights of the respondent. The act also provides for *ex parte* approval of a plan to correct deficiencies in order to permit immediate corrections of violations such as inadequate heat that immediately threaten the life of the residents.

1. 2 R. Clark, *A Treatise on the Law of Receivers* §§ 357, 378(f) (3d ed. 1959).

2. *See, e.g.*, N.Y. Mult. Dwell. Law § 309.d.1 (McKinney 1974 & Supp. 1982-83) (receiver may incur up to twenty-five hundred dollars ($2,500) for repairs).

Section 31.8. Payment to Receiver.

(A) A person who is served with notice of an order of the court appointing a receiver and of the receiver's name and address shall be liable to pay the receiver for any goods or services provided by the receiver after the date of the order if the person would have been liable for the goods or services as supplied by the licensee or agent of the licensee. The receiver shall give a receipt for each payment and shall keep a copy of each receipt on file. The receiver shall deposit amounts received in a special account and shall use this account for all disbursements.

(B) The receiver may bring an action to enforce the liability created by subsection (A). Proof of payment to the receiver is as effective in favor of the person making the payment as payment of the amount to the person who, but for this subsection, would have been entitled to receive the sum so paid.

(C) A resident may not be discharged, nor may any contract or rights be forfeited or impaired, nor may forfeiture or liability be increased, by reason of an omission to pay a licensee or other person a sum paid to the receiver.

COMMENT

This section gives the receiver the same authority to receive payment for goods and services and to enforce payment for goods and services as the licensee would have had. It further provides that no action can be taken against a resident or anyone else for paying money to the receiver which otherwise might have been owed to the licensee. A similar provision appears in certain receivership statutes regulating nursing homes.[1] Receivers are generally authorized to collect outstanding claims as provided in this section.[2]

1. *See, e.g.*, Wis. Stat. Ann. § 50.05 (West Supp. 1982); Comment, *An Advocate's Guide to Health Care Facility Receivership*, 16 Gonz. L. Rev. 695, 717 (1980-81).

2. 2 R. Clark, *A Treatise on the Law of Receivers* § 365 (3d ed. 1959).

Section 31.9. Avoidance of Preexisting Leases, Mortgages, and Contracts.

(A) A receiver may not be required to honor any lease, mortgage, secured transaction, or other wholly or partially executory contract entered into by the licensee or administrator of the home if:

(1) the person seeking payment under the agreement was a licensee or administrator of the home or was an affiliate of a licensee or administrator at the time the agreement was made; or

(2) the rental price, or rate of interest required to be paid under the agreement was substantially in excess of a reasonable rental price or rate of interest at the time the contract was entered into.

(B) If the receiver is in possesion of real estate or goods subject to a lease, mortgage, security interest, or other contract which the receiver is permitted to avoid under subsection (A), and if the real estate or goods are necessary for the continued operation of the home under this section, the receiver may apply to the court to set a reasonable rental price or rate of interest to be paid by the receiver during the duration of the receivership. The court shall hold a hearing on the application within fifteen (15) days after receipt of the application. The receiver shall send notice of the application to any known owners of the property involved at least ten (10) days prior to the hearing.

(C) Payment by the receiver of the amount determined by the court to be reasonable is a defense to any action against the receiver for payment or for possession of the goods or real estate subject to the lease, mortgate, security interest, or other contract involved by any person who received such notice, but the payment does not relieve the licensee of liability for the difference between the amount paid by the receiver and the amount due under the original lease, mortgage, or security interest involved.

COMMENT

Like the preceding section, this section confers upon the receiver authority to take necessary actions to avoid leases, mortgages, and other contracts if payment under the contract is sought by the licensee or if the amounts to be paid under the contract exceed a reasonable amount.

In this section, provision is made for the court to set a reasonable price for the goods and services under a contract which a receiver has set aside under this section when the receiver determines that the home needs the goods and services for continued operation. Note that although payment by the receiver of the amount determined by the court to be reasonable relieves the receiver of liability under the contract, the licensee may still be liable for the difference between the price paid by the receiver and the actual amount due under the contract. This provision, which is similar to provisions in other receivership statutes, is consistent with a receiver's traditional authority to set aside fraudulent transactions.[1]

1. 2 R. Clark, *A Treatise on the Law of the Receivers* § 364 (3d ed. 1959). A similar provision appears in the model statute proposed in Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695, 717 (1980-81).

Section 31.10. Contingency Fund.

(A) The legislature shall appropriate a sufficient sum of money to establish a receivership contingency fund.

(B) Upon a showing that expenses of the receivership exceed the operating funds of the home, the court, in its discretion, may order that the agency pay to the receiver proceeds from the fund for the following:

(1) payment of the expenses of the receiver incurred with respect to implementation of a court-approved plan for correction of deficiencies in excess of $1,000; and

(2) compensation of the receiver.

COMMENT

The model act provides for a contingency fund because one of the strongest arguments against the use of receiverships in the regulation of board and care homes is the expense. Commentators have pointed out that the income of a nursing home may not be sufficient to cover the expense of a receiver.[1] It would not be difficult to surmise that the expense of a receiver might be an obstacle in regulating board and care homes as well.

In addition, there may be instances in which substandard conditions exist in a home because the licensee cannot afford to make the capital improvements required to correct the deficiencies. One example is a home in which a sprinkler system may be required by state fire standards. Since one goal of the model act's receivership provision is the rehabilitation of a facility, contingent financial arrangements should be available to cover the compensation of the receiver and the cost of correcting the deficiencies.

A number of receivership provisions in nursing home statutes provide for contingency funds that can be used by the receiver to cover the expenses of performing any powers and duties for which there are insufficient funds.[2] These provisions generally hold the licensee personally liable for the reimbursement of expenditures from the contingency fund.

The model act limits the use of the contingency fund to those expenditures in which the state has the greatest interest, i.e., rehabilitation of the home. The state legislature should not be required to appropriate money to cover the costs of the ongoing administration of the

home during the pendency of the receivership. It is within the powers and duties of the receiver to take whatever action is necessary to insure that operating expenses are met.

1. Johnson, *Nursing Home Receiverships: Design and Implementation,* 24 St. Louis U.L.J. 681, 711 (1981).
2. *See* Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695, 718 (1980-81) which states in its proposed model statute:

   NEW SECTION: SECTION TEN: Contingency Fund

   > The legislature shall appropriate sufficient funds to allow the department to provide for a supplemental fund to meet expenses that cannot be met by funds collected under section seven subs. (A)(6) and (7). This fund is for the payment of expenses of performing the powers and duties conferred on the receiver by section seven. Operating funds collected under this section and not applied to the expenses of the receivership shall be used to reimburse the fund for advances made under this section. Owners, operators or other controlling persons will be personally liable for any deficiency incurred by the receiver.

Section 31.11. Termination of Receivership.

The court shall order the termination of the receivership upon a showing that the goals of the receivership have been met.

COMMENT

The model act leaves the date for termination of the receivership within the discretion of the court.[1] The respondent, petitioner, and receiver have sufficient interests in the termination of the receivership so that at least one of these parties will bring to the court's attention the fact that the receivership is no longer needed because the goals of the original order have been met.

A number of statutes limit the appointment of a receiver to a specific period of time, allowing for extensions of that time if circumstances require.[2] Although the receiver should be appointed for as limited a period of time as possible, the initial length of time set by most statutes, three (3) to six (6) months, often may be too short to accomplish the goals of the receivership. Additionally, the need to apply for extensions requires the expenditure of limited time and resources. Further, expiration of a court-ordered receivership prior to resolution of its goals diminishes the effectiveness of the receivership. Since the final order of the court terminating the receiver usually provides for the transfer or disposition of remaining assets, expiration of a receivership without formal termination by the court could leave financial matters unresolved.[3]

1. This is the usual method of termination of a receiver. 3 R. Clark, *A Treatise on the Law of Receivers* § 690 (3d ed. 1959).
2. *See, e.g.,* N.Y. Soc. Serv. § 461-f(3)(e) (McKinney Supp. 1981-82).
3. 3 R. Clark, *A Treatise on the Law of Receivers* §§ 696-699.1 (3d ed. 1959).

Section 31.12. Compensation of Receiver.

The court shall set the compensation of the receiver.

COMMENT

Section 31.12 of the model act follows the general rule that the court is to set the amount of compensation that the receiver is entitled to receive.[1]

1. 2 R. Clark, *A Treatise on the Law of Receivers* §§ 637-645.1 (3d ed. 1959).

Section 31.13. Accounting Lien for Expenses.

(A) Within thirty (30) days after termination of the receivership, the receiver shall give the court a complete accounting of:

(1) all property of which the receiver has taken possession;

(2) all funds collected under this section; and

(3) expenses of the receivership.

(B) If the operating funds collected by the receivership exceed the reasonable expenses of the receivership, the court shall order payment of the surplus to the licensee, after reimbursement of funds drawn from the contingency fund. If the operating funds are insufficient to cover the reasonable expenses of the receivership, the licensee shall be liable for the deficiency. The licensee may apply to the court to determine the reasonableness of any expenses of the receivership. The licensee shall not be responsible for expenses in excess of what the court finds to be reasonable. Payment recovered from the licensee shall be used to reimburse the contingency fund for amounts drawn by the receiver.

(C) The court may order that the agency shall have a lien for any reasonable costs of the receivership which are not covered by the operating funds collected by the receiver and for any funds paid out of the contingency fund during the receivership upon any beneficial interest, direct or indirect, of any licensee or administrator in the following property:

(1) the building in which the home is located;

(2) the land on which the home is located;

(3) any fixtures, equipment, or goods used in the operation of the home; or

(4) the proceeds from any conveyance of property described in paragraphs (1), (2), and (3) of this section made by the licensee or administrator within one year prior to the filing of the petition for receivership.

(D) The lien provided for in this section is superior to any lien or other interest which originates subsequent to the filing of a petition for receivership under this section, except for a construction or mechanic's lien arising out of work performed with the express consent of the receiver.

(E) The clerk of the court for the county in which the home is located shall record the filing of the petition for receivership in the lien docket opposite the names of the licensees and administrator named in the petition.

(F) Within sixty (60) days after termination of the receivership, the receiver shall file a notice of any lien created under this section. If the lien is on real property, the notice shall be filed with the clerk of the court of the county in which the home is located and entered on the lien docket. If the lien is on personal property, the lien shall be filed with the person against whom the lien is claimed, and shall state the name of the receiver, the dates of the petition for receivership, the termination of receivership, a description of the property involved, and the amount claimed. No lien shall exist under this section against any person, on any property, or for any amount not specified in the notice filed under this section.

COMMENT

Every receiver is required to give an accounting of the property and funds collected and the expenses of the receivership.[1] The procedure for an accounting set out in this section is based on a similar provision in a model statute proposed by one commentator,[2] and is adapted from Wisconsin's receivership provision.[3]

This section sets out requirements for obtaining a lien and filing a lien that may vary with each state. A state which adopts this section of the model act will need to examine its own laws regarding attachment of liens to insure consistency between this section and state law.

Section 31.13 of the model act also sets out the procedures through which a state may seek reimbursement for expenditures from the contingency fund by obtaining a lien on real or personal property of the operator. For example, if a receiver determines a residential sprinkler system must be installed in a home to bring it into compliance, the court may order that the expense of installing the system be levied against the contingency fund, but that a lien in favor of the state must be placed on the home in the amount of the expenditure. When the home is sold or transferred, the state will be reimbursed in the amount of the lien.

1. 3 R. Clark, *A Treatise on the Law of Receivers* § 699.1 (3d ed. 1959).
2. Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695, 718 (1980-81).
3. Wis. Stat. Ann § 50.05 (Supp. 1982-83).

Section 31.14. Obligations of Licensee.

Nothing in this section shall be deemed to relieve any licensee or administrator of a home placed in receivership of any civil or criminal liability incurred, or any duty imposed by law, by reason of acts or omissions of the licensee or administrator prior to the appointment of a receiver under this section. Nothing contained in this section shall be construed to suspend during the receivership any obligation of the licensee or administrator for payment of taxes or other operating and maintenance expenses of the facility nor the licensee or administrator or any other person for the payment of mortgages or liens. No licensee or administrator may be held professionally liable for acts or omissions of the receiver or the receiver's employees during the term of the receivership.

COMMENT

This provision prohibits the licensee from claiming the appointment of a receiver as a defense to any other civil or criminal proceeding. A licensee can be found guilty of criminal charges or be liable for damages even though a petitioner has successfully obtained the appointment of a receiver to administer the licensee's home. Section 31.14 also clearly requires the licensee to be responsible for payment of taxes or any other operating expenses during the pendency of the receivership, except that the licensee is relieved of professional liability as a result of acts of omission of the receiver, the receiver's agents, and employees. This section is based upon similar provisions found in other receivership statutes.[1]

1. *See, e.g.,* Comment, *An Advocate's Guide to Health Care Facility Receivership,* 16 Gonz. L. Rev. 695, 721 (1980-81).

SECTION 32. INJUNCTION.

Section 32.1. Grounds.

A resident, the agency, the attorney general, or an advocate may bring an action for a temporary restraining order, preliminary injunction, or permanent injunction against a board and care home to enjoin:

(A) any act or omission which constitutes a violation of this Act; or

(B) operation of:

(1) an unlicensed home;

(2) a licensed home against which procedures for renewal or revocation of this home's license have been initiated and that has violations that have resulted in conditions that present an imminent danger or violate resident's rights as provided in section 10.

COMMENT

This section provides that a resident, the agency, the attorney general, or an advocate may bring an action for an injunction. The same reasons that argue in favor of authorizing these persons to bring an action for receivership apply to bringing an action for injunctive relief.[1]

The act authorizes the same types of injunctive orders as are provided for in the federal rules of civil procedure: temporary restraining orders, preliminary injunctions, or permanent injunctions.[2] The inclusion of these three types of orders permits injunctive relief at three different stages of a proceeding. A temporary restraining order (TRO) may be issued in an *ex parte* hearing; a preliminary injunction may be ordered after an expedited hearing which is usually, but not always, less thorough in the presentation of evidence than a full trial; and a permanent injunction may be issued as final relief after a full trial of all the issues.[3]

At least one noted commentator on the enforcement of nursing home statutes has questioned the effectiveness of an action for injunctive relief.[4] The prevailing viewpoint is that an injunction is one of the most powerful remedies.

> An injunction is an *in persona* order, directing the defendant to act, or refrain from acting in a specified way. It is an extremely powerful instrument. It may be enforced by the contempt power, so that the disobedient defendant may find himself in jail, or fined or deprived of the right to litigate issues.[5]

A number of statutes permit agencies to seek injunctive relief only to enjoin the operation of an unlicensed facility.[6] However, because of the usefulness of an injunction as a remedy and the potential for obtaining *ex parte* relief by means of a temporary restraining order, the model act has sought to broaden its application by allowing injunctive relief for any violation of the act.

One popular misconception is that an injunction can be used only to restrain any act rather than to require a positive action. Although as a matter of form, most injunctions enjoin certain conduct on the part of the defendant, they may also be used to require the defendant to take affirmative action.[7]

Under the model act, a court can enjoin acts of omissions that violate the act or the operation of a home. As part of its authority to enjoin the operation of a home, the court also has the power to suspend admissions and transfer residents from a home.

1. *See supra* section 31.1 for a discussion of the reasons in support of authorizing the resident, resident's guardian, the state agency, the attorney general, and the public advocate to bring action for appointment of a receiver.
2. *See* Fed. R. Civ. P. 65. State civil rules based upon the federal rules also include provisions similar to if not the same as Rule 65. *See, e.g.,* Ohio R. Civ. P. 65 (Page 1982). *See also* Dobbs, *Handbook on the Law of Remedies,* 106-07 (1973).
3. For a thorough discussion of each of these three types of injunctive relief, *see* Dobbs, *supra* note 2.
4. Butler, *Nursing Home Quality of Care Enforcement Part II — State Agency Enforcement Remedies,* 14 Clearinghouse Rev. 668, 674-76 (1980).
5. Dobbs, *supra* note 2, at 105.
6. *See, e.g.,* Ariz. Rev. Stat. Ann. § 36-340 (1974 & Supp. 1982-83).
7. *Id.* Dobbs points out that, "The form and wording of the injunction are seldom important, since an injunction prohibiting in form may operate in substance to compel a positive act either as a logical or practical necessity."

Section 32.2. Procedures.

An action for a temporary restraining order, preliminary injunction, or permanent injunction shall be brought in a court of competent jurisdiction in accordance with the rules of civil procedure.

COMMENT

Rather than set out the procedures and requirements for bringing an action for an injunction, the model act incorporates by reference the state's own rules of civil procedure that should govern a civil action for injunctive relief. Many states have civil rules based upon Rule 65 of the Federal Rules of Civil Procedure that set out the substantive test and procedural requirements for obtaining injunctive relief. A state wishing to adopt the model act that does not have rules of civil procedure similar to the federal rules may need to draft additional statutory provisions setting out the procedures and requirements for bringing an action for an injunction.

SECTION 33. CIVIL ACTION FOR DAMAGES BY RESIDENT.

Section 33.1. Grounds.

(A) Residents of board and care homes individually or as a class may bring an action in a court of competent jurisdiction to recover actual and punitive damages for an injury that results from a violation of this Act. If the violation is of the rights of residents as specified in section 10, the resident shall be awarded three times the actual damages or $1,000, whichever is greater.

(B) The right of a resident to bring an action pursuant to this section is in addition to any other rights or remedies the resident may have by statute or at common law.

COMMENT

The model act permits residents, the persons who are the most affected by violations of the act, to bring actions on their own behalf.[1] In other sections of the model act, residents may seek the appointment of a receiver and an

injunction, and in this section, they may bring an action for damages for an injury or deprivation of a right.

Under this section, the licensee may be liable for damages for injury to a resident as a result of a violation of the model act. In order to establish a *prima facie* case under this section, the resident only need show that the injury resulted from an act or omission of the licensee which constitutes a violation of the model act.[2]

Recognizing that actual damages may be nominal in some instances, the model act authorizes the court to award punitive damages, and, in the case of a violation of a resident's right, treble damages or $1,000 may be awarded.[3] The successful resident may also be awarded attorney's fees and costs under section 37 of the model act.

The model act does not set out the basis for awarding punitive damages since those grounds are usually determined by case law, civil rules, or statutes of a state.

1. The last sentence of subsection (A) is based upon a provision in Ill. Rev. Stat. ch. 111½, § 4153-602 (Smith-Hurd Supp. 1982-1983), although that provision only authorizes an award of $500.
2. Individuals who bring actions on their own behalf to enforce a statute that directly affects them are often referred to as private attorneys general. Hoffman & Schreirer, *A Private Right of Action Under Missouri's Omnibus Nursing Home Act,* 24 St. Louis U.L.J. 674 (1981).
3. Although nursing homes have been held liable under general tort law for some intentional and negligent acts that have resulted in injury to residents, it is not clear to what extent board and care homes would be liable for injuries to residents. The duty of care owed by such homes to residents is not clearly established except by reference to statutes regulating these homes. For a discussion of tort liability of nursing homes *see Annot.,* 83 A.L.R.3d 871 (1978 & Supp. 1983); Comment, *Regulation of Nursing Homes — Adequate Protection for the Nation's Elderly,* 8 St. Mary's L.J. 309 (1976).

Section 33.2. Defenses.

It shall be an affirmative defense to an action as provided in section 33.1 that the licensee, an agent, or employee of the licensee exercised reasonable care to prevent the deprivation and injury for which liability is asserted. The adoption of policies and procedures to implement the model act shall not be sufficient evidence alone to show that the home exercised reasonable care.

COMMENT

Section 33.2 permits the licensee to defend against liability by showing that reasonable care was exercised to avoid the injury or deprivation alleged. This section, modeled after a provision of Missouri's Omnibus Nursing Home Act,[1] permits a licensee to avoid liability in those cases in which the licensee was exercising reasonable care to prevent the injury, as, for example, when an injury occurs as a result of a violation during the period in which the licensee is attempting to correct the violation and after the licensee has warned the residents of the existence of a danger. The second sentence of this section makes it clear that implementation of policies and procedures by itself is not sufficient to establish that the licensee has exercised reasonable care to prevent the injury and deprivation.[2]

1. Mo. Ann. Stat. § 198.093(4) (Vernon Supp. 1982).
2. This sentence was included as a result of the analysis of the Missouri provision in Hoffman & Schreirer, *A Private Right of Action Under Missouri's Omnibus Nursing Home Act,* 24 St. Louis U.L.J. 661, 679 (1981) which states:

> This provision precludes liability for trivial and inconsequential matters which arise in the everyday course of nursing home life. The courts must exercise care and discretion, however, to prevent the affirmative defense from destroying the effect of the private right of action. Facilities should not be permitted to invoke this defense by merely offering evidence of the adoption of policies and procedures as required by the Omnibus Act. Rather, the focus should be on the circumstances of the particular deprivation alleged, in light of the needs and abilities of the resident and, for an example, of efforts that were actually made to ensure that the residents' needs were met on a daily basis.

SECTION 34. ACTION FOR MANDAMUS.

A resident, advocate, or licensee of a board and care home may bring a civil action for mandamus to order the agency to carry out any act which is required to be performed by the agency under the Act.

COMMENT

This section authorizes a resident, an advocate, or the licensee of a home to bring a mandamus action to compel the agency to carry out its non-discretionary duties under the model act. A mandamus action can be maintained only to compel an agency to perform affirmative duties or duties which are required rather than discretionary.[1] Mandamus actions are authorized by statute or available at common law in most states.[2] Although a mandamus action may be an equitable remedy at common law, statutory authorization for a mandamus action encourages residents, advocates, and licensees to bring such actions.

This provision is intended to provide an extra safeguard against the agency's inaction in carrying out its mandatory obligations under the act. Where the model act clearly imposes mandatory duties, therefore, such duties may be compelled in a mandamus action. For example, the agency is required to inspect homes at certain times, including inspections before issuance and annual renewal of a license. Further, the agency is required to carry out a training program and provide consultation upon request. Another important example of a mandatory duty is the requirement under the act that the agency impose an administrative sanction or seek a court remedy if a home has failed to correct violations within a specified period of time and has not received a variance.

Recently, courts have "interpreted regulatory statutes to impose a judicially enforceable duty to initiate enforcement proceedings."[3] A court therefore may order the agency to commence administrative or court proceedings in a mandamus action brought under this section.

As noted earlier, a mandamus action cannot be brought to compel discretionary acts. The mandamus remedy should not be available, therefore, to compel discretionary obligations of the agency. For example, a mandamus action probably could not order the agency to issue a notice of violation. This is because the act mandates that such a notice be served upon a licensee only "if the agency determines that a condition in the home is a violation of a regulation or provision of this Act."[4] Although the act states that a notice of violation "shall" be served upon a licensee, the agency retains discretion implicit in the phrase "if the agency determines."[5] Thus, when the model act states that the agency "shall" perform certain duties, but includes conditions which the agency must find before performance is required, discretion is implied and a mandamus action probably would not be available.[6]

1. D. Dobbs, *Handbook on the Law of Remedies* (1973); Butler, *A Long-Term Health Care Strategy for Legal Services,* 14 Clearinghouse Rev. 613, 635-636 (1980). Most statutes give agencies discretion to institute administrative or court actions. *See supra* section 23 & comment; *See, e.g.,* Mo. Stat. § 198.067 (Vernon Supp. 1982); Ga. Code § 31-7-48 (1982); N.J. Stat. Ann. § 55: 13B-10, -11 (Supp. 1982); Or. Rev. Stat. §§ 443.415(2), 443.991 (1981).
2. *See, e.g.,* Wis. Stat. Ann. § 50.10(2) (West Supp. 1982), a provision in Wisconsin's board and care licensing statute permitting a resident to bring a mandamus action against the agency. *See also* 42 U.S.C. § 7604(a) (1983), the Clean Air Act, which authorizes any person "to bring a civil suit against the United States [or], against the administrator for alleged failure to perform a nondiscretionary duty ...." and granting jurisdiction to district courts to order the administrator to perform its duties. 2 K. Davis, *Administrative Law Treatise* 236 (1979). *See also* D. Dobbs, *supra* note 1, at 112.
3. *See* cases cited in Diver, *Civil Money Penalties,* 79 Colum. L. Rev. 1435, 1480 (1979).
4. Section 22.1 *supra.*
5. *See* Diver, *supra* note 3.
6. *Id.*

SECTION 35. RIGHT OF RESIDENT TO INTERVENE IN AGENCY ADJUDICATION PROCEEDINGS.

A resident may intervene in any adjudication proceeding as provided in section 6 in which the agency and the licensee of the home in which the resident resides are parties.

COMMENT

This section gives a resident an absolute statutory right to intervene in agency adjudication proceedings involving the resident's home. The primary purpose of this section is to permit residents to participate in agency hearings involving imposition of administrative sanctions or granting of variances. Participation of residents is critical because the agency may not necessarily represent their interests in such hearings and residents may want to intervene in order to request different relief or certain procedures in a particular action. Thus, for example, residents may wish to intervene in an agency proceeding to revoke a license, suggesting instead that a receivership may be a more satisfactory remedy.[1] Or, in a delicensing proceeding, residents may wish to request an orderly plan for transfer of residents.[2] There also may be instances where residents may wish to intervene to support the agency's position.[3]

State administrative procedure acts (APA) are incorporated into the model act by section 6 and govern whether a person may intervene in an agency proceeding. Under the 1961 Revised Model State Administrative Procedure Act, which has been adopted by over half the states, the issue of intervention is addressed only by implication in the definition of "party."[4] "Party" under the 1961 Model Act is defined as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."[5] Since the model act authorizes intervention by a resident as of right, under many state APAs a resident may be admitted as a party in agency adjudication proceedings.

In states that do not adopt this section, the definition of "party" in most state APAs may be too restricted or narrow to authorize a resident to intervene in agency proceedings. One commentator noted, however, that "residents demonstrating an interest in the agency ... proceedings should be entitled to direct participation on the grounds that administrative procedure acts should be liberally interpreted to permit intervention, and by analogy to court rules providing for intervention by interested parties, discussed *infra.*"[6] However, state APAs with a more liberal definition of "party" may be interpreted to qualify residents as intervenors in agency proceedings. For example, Ohio's APA defines "parties" as persons "whose interests are the subject of an adjudication by an agency."[7] In states with such broad definitions, a resident should be able to show that his or her interest in continuing to reside in the home or in assuring a proper and smooth transfer from the home would satisfy this standard.

In states which have adopted the 1981 Model State Administrative Procedure Act, which has detailed, systematic provisions for intervention,[8] a resident should be eligible to intervene even without this section of the act. The 1981 provision states that intervention shall be granted if it is demonstrated that "the petitioner's legal rights, duties, privileges or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law."

1. Butler, *A Long-Term Health Care Strategy for Legal Services,* 14 Clearinghouse Rev. 613, 629 (1980).
2. *Id.*
3. *Id.*

4. Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws, (1961); 1 K. Davis, *Administrative Law Treatise* 36-37 (1978); Colo. Rev. Stat. § 24-4-102 (11) (1973).
5. Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws, § 1(5) (1961). *See also* 1 K. Davis, *supra* note 4.
6. Butler, *supra* note 1.
7. Ohio Rev. Code Ann. §§ 119.01, 119.01(G) (Page 1973). *See also* Butler, *supra* note 1.
8. Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws, § 4-209 (1981).

SECTION 36. RIGHT OF RESIDENT TO SEEK JUDICIAL REVIEW OF FINAL AGENCY ACTION AND TO INTERVENE IN JUDICIAL REVIEW PROCEEDINGS.

(A) A resident may seek judicial review of final agency action and may intervene in any judicial review proceeding if the licensee of the home in which the resident resides is a party.

(B) Judicial review proceedings shall be conducted in accordance with procedures provided in section 6 of this Act.

COMMENT

This section provides explicit statutory authority entitling a resident to bring a judicial review action and to intervene in a judicial review proceeding involving agency action against the resident's home. Even without a provision specifically conferring standing upon residents to seek judicial review, a resident may be entitled to seek judicial review under the state's administrative procedure act (APA), which has been incorporated by reference into the model act.[1] In states that have adopted the 1981 Model State APA, residents should have no difficulty in seeking judicial review, since standing is broadly defined.[2] Under most state APAs or in states which have adopted the 1961 Model Act, however, the definition of standing may be more restricted.[3] Under the 1961 Model Act, persons "aggrieved" by a final agency decision may seek judicial review.[4] A resident may be able to argue successfully that he or she is "aggrieved" by an agency decision under this definition. Nevertheless, in order to ensure that a resident has standing to seek judicial review of an agency decision, this section provides an absolute right of a resident to seek judicial review, rather than leaving it to a court's discretion to decide whether a resident meets the APA definition.

This section of the act also entitles a resident to intervene in a judicial review proceeding already instituted by the licensee of the resident's home. Under most state civil procedure rules and the Federal Rules of Civil Procedure, intervention as of right is allowed if specifically conferred by statute, as this section does,[5] or if the standard for intervention set out in the state's civil procedure rule is satisfied. The standard for intervention under most state rules and under the Federal Rule of Civil Procedure 24(a)(2) focuses on the "interest" that the intervenor has in the subject matter of the litigation.[6] Finally, if either test for intervention as of right is not met, under civil procedure rules, a court has discretion to allow intervention if a resident satisfies the standard for permissive intervention.[7]

One commentator noted a case in which nursing home residents were denied intervention in judicial review proceedings involving revocation of the home's license and termination of its operation.[8] Since a court may hold that board and care home residents do not meet the intervention as of right test and may decline permissive intervention, this section is intended to provide an absolute right of residents to intervene in judicial review proceedings involving agency action against their home.

1. *See supra* section 6.
2. Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws, §§ 5-102, -103, -106 (1981).
3. *See* Butler, *A Long-Term Health Care Strategy for Legal Services,* 14 Clearinghouse Rev. 613, 629 (1980). Butler states that most state APAs "limit the parties who may seek judicial review to the persons aggrieved by agency action and parties to administrative hearings." *See, e.g.,* Ill. Ann. Stat. ch. 110, § 267 (Smith-Hurd 1968). Some federal statutes confer standing on any person "adversely affected or aggrieved" by an agency order. *See, e.g.,* 30 U.S.C. § 816 (1971) (Coal Mine Health and Safety Act (1961)).
4. Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws, § 15 (1961).
5. *See* M. Hardin & J. Bulkley, *The Rights of Foster Parents to Challenge Removal and to Seek Adoption of Their Foster Children,* in *Foster Children in the Courts* 299, 311 (M. Hardin ed. 1983).
6. Fed. R. Civ. Proc. 24(a)(2) provides for intervention as of right of a person where:
   1. the intervenor has an interest in the subject of the action;
   2. the ability to protect this interest may be impaired by the disposition of the case; and
   3. existing parties do not adequately represent that interest.

   M. Hardin & J. Bulkley, *supra* note 5, at 331 n. 91, citing J. Fleming & G. Hazard, *Civil Procedure* § 10.19 (2d ed. 1977); C. Wright & A. Miller, *Federal Practice and Procedure* § 1908 (1972); J. Moore & J. Kennedy, *Moore's Federal Practice* § 24.09-1[2] (1982). *See also* Butler, *supra* note 3, at 629 n. 80; Ill. Ann. Stat. ch. 110, § 26.1 (Smith-Hurd 1968); Cal. Civ. Proc. Code § 387 (West 1976); N.Y. Admin. Proc. Act §§ 41012, 41013 (McKinney 1978).
7. Under Fed. R. Civ. Proc. 24(b)(2) and many state civil procedure rules, discretionary intervention is permitted when "the applicant's claim or defense shares common questions of law or fact with that of the main action and intervention would not delay or prejudice other parties' rights." Butler, *supra* note 3, at 629 n. 81. *See also* statutes cited in note 6 *supra.*
8. *See* Butler, *supra* note 3, & *Bracco v. Lackner,* 462 F. Supp. 436 (N.D. Cal. 1978), in which the intervention denial is discussed. *See also* Butler, *supra* note 3, 630 n. 83, in which *City of Chicago v. Harris Trust & Savings Bank,* 299 N.E. 2d 57 (1973) is cited. This case allowed tenants to intervene in a judicial proceeding in which the city sought a fine, injunction, and receiver for a building with housing code violations. *Id.*

SECTION 37. ATTORNEY'S FEES.

The court may award reasonable attorney's fees and costs to the prevailing party in any action brought under this Act.

COMMENT

This provision of the model act allows a court to order the losing party to pay the attorney's fees and costs of a person who successfully maintains any action under this act, including an action for an injunction, receivership, damages, or other relief. A number of statutes use similar language to authorize courts to award attorney's fees to a prevailing party, particularly in an action brought to enforce the rights of a resident of a nursing home or other residential facility.[1]

The award of attorney's fees to the prevailing party is contrary to the traditional practice in American courts in which each litigant bears the cost of his or her own attorney regardless of the outcome of the case.[2] This system for payment of attorney's fees is peculiar to the American system of justice and, for that reason, has been labeled the "American Rule".[3] In the courts of most countries other than in the United States, attorney's fees are awarded to the prevailing party on the theory that the award of attorney's fees is necessary to fully compensate the injured party and to deter persons from bringing frivolous actions.[4]

By permitting the court to award attorney's fees to the prevailing party, the model act seeks to encourage persons to bring actions to enforce their rights and to enjoin potentially dangerous actions in which the actual damages may be difficult to prove or too small to compensate counsel and the injured party.[5]

A mandatory requirement that the losing party pay the fees of the successful litigant is not without negative effects. Given the uncertainty of the outcome of litigation, requiring the losing party to pay the costs of two attorneys, could deter poor persons from bringing actions that may have an above average chance for success.[6] In addition, justice may not always be served by imposing the cost of counsel for both parties on a licensee, particularly if lack of funds contributed to the violation that gave rise to litigation. In order to maintain flexibility to address circumstances such as those described, the model act allows the court to use its discretion in awarding fees and costs to the successful party.

It is intended that a court's decision as to whether to award fees to a prevailing party should be guided by decisions of the U.S. Supreme Court, which has interpreted similar language in federal statutes. For example, the Supreme Court has held that ". . . one who succeeds in obtaining an injunction under . . . Title [II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[7] In other words, the losing defendant must be ordered to pay the fees of the party who successfully obtains the relief requested under the model act. The only exception to this requirement is if the court determines that it would be unjust to order an operator to pay the plaintiff's attorney's fees because of the existence of special circumstances.

The U.S. Supreme Court also has considered when attorney's fees should be awarded to a successful defendant under Title VII of the Civil Rights Act.[8] The court reasoned that a successful defendant is not entitled to an award of fees on the same basis as a successful plaintiff.[9] Rather, the court held that ". . . a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[10] Both of these rules for determining when to award attorney's fees and costs to a prevailing party in an action for receivership, injunction, damages, or other relief should be used by courts in interpreting this section of the model act.

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1. *See, e.g.,* D.C. Code Ann. § 6-1973(e) (1981).
2. *But see Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). The court stated that, "It follows that one who succeeds in obtaining an injunction under that Title [Title II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402.
3. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. Pa. L. Rev. 636, 637 (1974).
4. *Id.* at 639.
5. *Id.* at 650, which states,

   > Rejection of the American Rule clearly should have the effect of encouraging the person with a just but monetarily small claim to seek redress. Current practice tends to deter the prosecution of even clearly meritorious small claims by litigants who could at best recover less than the often high expenses of counsel; the contingent fee, moreover, fails to promote such claims, for even a fifty percent fee is unlikely to interest an attorney if the claim is truly a small one. And what is true for plaintiffs also holds for defendants; the cost of defending against an unjust small claim may easily exceed the cost of simply paying what is demanded.

6. Hoffman & Schreirer, *A Private Right of Action Under Missouri's Omnibus Nursing Home Act,* 24 St. Louis U.L.J. 678 (1981). *See also* Comment, 122 U. Pa. L. Rev., *supra* note 3, at 651-52, which states: "Rejection of the American Rule would likely encourage assertion of a clear legal right with a high probability of success but would add to the deterrence of the present system in cases where the litigant's claim was novel or of arguable worth. Since a poor man is likely to fear the prospect of paying both counsel more than a wealthy one, it would seem likely that — except where completely judgment-proof — he would often be manipulated into premature settlement."

   In addition, the U.S. Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412 (1978), warns the trial court, "[to] resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most outright claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . The court of litigation is never really predictable. Deceit may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."
7. 390 U.S. at 402 (1968).
8. 434 U.S. 412.
9. *Id.* The court stated two reasons for its conclusions: "First as emphasized so forcefully in *Piggie Park,* the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' 390 U.S. at 402. Second, when a

district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violation of federal law. As the Court of Appeals clearly perceived, the policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant (citations omitted)." *Id.* at 418.

10. *Id.* at 421. One remaining issue that remains to be decided by the court is what constitutes a "prevailing" party. Although there is a split in decisions of the circuit courts regarding the applicable standard for determining when a party has prevailed, the court recently declined to accept jurisdiction to decide the issue. *Long v. Barnes,* 455 U.S. 961 (1982); *Kenley v. Young,* 455 U.S. 961 (1982).

SECTION 38. CRIMINAL PENALTIES.

Section 38.1. Misdemeanor.

(A) No person shall:

(1) operate a board and care home without a license as provided in section 17.1; or

(2) commingle, borrow from, or pledge any funds of a resident required to be held in a separate account as provided in section 10.5.

(B) No person shall purposely or knowingly:

(1) interfere with or attempt to interfere with or obstruct or attempt to obstruct by unlawful means any investigation under or enforcement of this Act;

(2) retaliate or discriminate against a resident or employee of a board and care home for:

(a) providing any information to a state official;

(b) filing a complaint under section 21; or

(c) initiating, participating in, or testifying in any action against a board and care home;

(3) file false, incomplete, or misleading information required to be filed under this Act;

(4) fail or refuse to file or to report information required under this Act;

(5) provide advance notice of an inspection when prohibited by section 20.5;

(6) place any person in or refer any person to a board and care home that is operating without a license; or

(7) commit any act that violates a provision of this Act and that creates a risk of death or serious harm to a resident.

(C) A violation of subsections (A) and (B) of this section constitutes a serious misdemeanor as defined by state law.

Section 38.2. Felony.

(A) No person shall purposely, knowingly, recklessly, or negligently commit any act that violates a provision of this Act and that results in death or serious harm to a resident.

(B) A violation of subsection (A) of this section constitutes a felony as defined by state law.

(C) A violation of subsections (A) and (B) of section 38.1 for which there has been a previous conviction constitutes a felony as defined by state law.

COMMENT

The model act provides both felony and misdemeanor penalties for certain violations of the act. The act also requires fault or *mens rea* for all offenses with the exception of operating an unlicensed home and commingling resident funds. For these two offenses, strict criminal liability is authorized. In addition to the sanction of delicensing, the other sanction commonly found in board and care licensing statutes is criminal penalties.[1] Some statutes include criminal provisions only for a few intentional violations similar to those in section 38 of the model act.[2] Like the model act, however, a number of statutes impose strict criminal liability for operation of a home without a license.[3] On the other hand, some licensing statutes provide strict criminal liability for violation of any statutory provision or regulation.[4]

The model act follows the Model Penal Code's four categories of criminal "fault" involving offenses, which are: (1) purposeful or intentional; (2) knowing; (3) reckless; or (4) negligent.[5] For the misdemeanor offenses listed in subsection 38.1(B), intent or knowledge is required.[6] However, when a resident has suffered serious harm (which may be physical, mental, or sexual) or death as a result of a violation of the model act, only criminal recklessness or negligence should be required.[7] Further, the proper category of criminal liability for this serious crime should be a felony.

There are a number of reasons for requiring fault rather than imposing strict liability for most criminal offenses under the model act. Although considered constitutionally valid,[8] strict criminal liability has been criticized widely by commentators.[9] In an analogous area involving housing code violations, for example, there has been reluctance to prosecute or sentence offenders for violations that do not require proof of intent; one commentator has noted that because "social welfare" offenses are not considered true crimes, punishment regardless of purpose or knowledge is not popular with judges.[10]

On the other hand, there may be benefits in providing strict liability for all violations of the act. Strict liability offenses evince a legislative recognition of inherent fault, in which "persons who intentionally engage in certain activities and occupy some peculiar or distinctive position of control are to be held accountable for the occurrence of certain consequences.[11]" It also has been argued that strict liability can be an effective deterrent because persons are likely to be more careful precisely because they can be found strictly liable for a particular act.[12] Finally, strict liability is justified as necessary or expedient where

convictions are difficult to obtain because of a fault requirement.[13]

For several reasons, however, the model act has included two offenses for which there is no fault requirement. The first is for operation of a home without a license. Through the act's requirement of a license, the state establishes and enforces standards against a licensee. By failing to obtain a license, an operator eschews compliance with all standards and, for such flagrant avoidance of the law's application, strict liability seems appropriate. Indeed, the arguments often cited in favor of strict criminal liability support its use for this offense. Strict liability also is provided for a home's use of a resident's personal funds for the home's expenses and for the personal expenses of the licensee or administrator. Misuse of resident funds is a common problem noted by at least one state prosecutor's office.[14] It has been noted that although a home may not intend to permanently appropriate a resident's money, financial difficulties of the home resulting in bankruptcy or receivership have led to permanent loss of resident funds; to safeguard against this problem, therefore, a home is strictly liable under the act for commingling funds.[15]

The other major decision regarding criminal penalties was to impose such penalties only for serious offenses rather than for all violations of the act. As one commentator noted in the area of housing code violations, providing criminal penalties for all violations "trivializes" such offenses, making no distinction between hard core offenders and less serious offenders.[16] In addition, when compared to serious crimes confronting judges on a daily basis, nondangerous violations of licensing standards do not seem to justify the same treatment by the criminal justice system. For this and other reasons, judges are likely to impose light sentences for nonserious violations.[17]

The criminal offenses included in the model act are serious offenses for which courts should not be reluctant to impose penalties. Indeed, they are considered to be among the most egregious offenses relating to the act's purposes and requirements. Such offenses include commingling resident funds, filing false information, unlawfully obstructing an investigation or inspection, discriminating or retaliating against a resident or employee, and committing an act that seriously harms or kills a resident.

Although the act does not impose criminal liability for all violations of the statute, there are advantages to establishing criminal liability for violation of any provision. If prosecution is not an empty threat, and significant fines are imposed, it has been argued that the stigma of criminal prosecution and fear of punishment has a deterrent effect.[18] Second, if continuances are used sparingly and cases are handled speedily, deterrence also may become a factor. Third, defendants may take criminal court actions more seriously and correct violations more quickly than if an administrative civil penalty process is utilized. Moreover, if a licensee obtains a variance and, after it expires, little progress has been made toward compliance, society has an interest (retribution) in punishing such behavior where it appears the licensee has flaunted the conciliation process, regardless of the violations involved.

Additionally, despite academic opposition to criminal prosecution of housing code violations, it remains the most common type of enforcement and is utilized successfully in a number of jurisdictions around the country in housing cases.[19] In jurisdictions with specialized housing courts, housing agency officials provide technical assistance to defendants in achieving compliance in connection with criminal code enforcement actions. Special prosecutors may be assigned to handle code enforcement cases, and judges impose substantial fines against recalcitrant landlords when compliance cannot be achieved within a reasonable time. If this type of agency and judicial commitment existed for the prosecution of violations in board and care homes, criminal penalties for all violations of the act might be effective.[20]

Despite the above arguments, the final decision to provide criminal penalties only for serious violations is based upon several premises. First, it is questionable whether criminal penalties for nonserious violations of licensing standards would serve as a general deterrent to licensees of board and care homes.[21] Second, it is doubtful that the goal of criminal law to enforce societal values is met through prosecution of all licensing violations.[22] Although this is an important goal for egregious or hazardous violations, for which the model act imposes criminal liability, less serious violations may engender the opposite reaction of sympathy for licensees, especially those with low incomes. Finally, an important goal of enforcement of health, safety, or welfare standards is to induce compliance with such standards through prompt correction of violations. While criminal penalties arguably may deter violations, they are unlikely to lead to correction of deficiencies once a licensee has violated the act's standards.[23]

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1. Almost half the board and care licensing statutes contain criminal penalties. *See State Laws and Programs Serving Elderly Persons and Disabled Adults*, 7 Mental Disability L. Rep. 158, 158-204 (1983).

2. *See, e.g.*, Del. Code Ann. tit. 16, §1110 (1975 & Supp. 1980); Iowa Code Ann. § 71-135C.21 (West 1972 & Supp. 1982-1983); Neb. Rev. Stat. § 71-2028 (1981 & Supp. 1982); Nev. Rev. Stat. § 449.210 (1981); S.D. Codified Laws Ann. § 34-12-18 (1976 & Supp. 1982); W. Va. Code § 16-5C-15 (1979).

3. *See, e.g.*, Ill. Stat. Ann. ch. 111½, §4153-318 (Smith-Hurd Supp. 1982-83); Ind. Code Ann. § 16-10-4-22 (Burns Supp. 1982); Okla. Rev. Stat. § 1-1916 (Supp. 1981-82); Wis. Stat. Ann. § 50.07 (West Supp. 1982).

4. *See, e.g.*, N.Y. Soc. Serv. Law § 460-f (McKinney Supp. 1981-82); Neb. Rev. Stat. § 71-2028 (1981 & Supp. 1982); S.C. Code Ann. §§ 34-12-18, 44-17-150 (Law Co-op. 1977 & Supp. 1982).

5. Model Penal Code § 2.02(2). *See also* W. Lafave & A. Scott, *Criminal Law* 198 (1972). These are defined as to the nature of conduct as follows:

> "Purposely"—conscious object to engage in conduct of that nature;
> "Knowingly"—awareness that conduct is of that nature;
> "Recklessly"—conscious disregard of a substantial and unjustifiable risk and the risk involves a

"gross deviation" from law-abiding conduct;
"Negligently"—awareness of a substantial and unjustifiable risk and the risk involves a "gross deviation" from law-abiding conduct.

The element of fault applies to the doing (or commission) of the forbidden act in the model act. In criminal law, fault may also apply to the causing of a result.

6. Intent traditionally was defined in criminal law to encompass both knowledge and intent in the strict sense. The modern trend, adopted by the model act, is to separate the two terms into purposeful and knowing offenses to clarify confusion regarding various types of criminal "intent." *See* W. LaFave & A. Scott, *supra* note 5, at 196. It normally has been said that "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his act." *Id.*

7. *See* W. LaFave & A. Scott, *supra* note 5, at 208-18, 605-06. *See also* Conn. Gen. Stat. Ann. § 53A-62 (West 1977 & Supp. 1982); N.Y. Penal Law, 120.00 (McKinney 1975), which include criminal negligence and recklessness for the offense of battery. The most common type of criminal negligence or recklessness offenses are involuntary manslaughter and battery. W. LaFave & A. Scott, *supra* note 5, at 211.

8. Cases upholding the constitutionality of strict liability include: *People v. Balmer*, 17 Cal. Rptr. 612 (1961) (nursing home health and sanitation violations); *People v. Bachrach*, 170 Cal. Rptr. 773 (Super. Ct. 1980) (multiple dwelling fire and safety code violations); *Aantex Pest Control Co. v. Structural Pest Control Board*, 166 Cal Rptr. 763 (1980) (agricultural code violations of general public welfare regulations). In *United States v. Park*, 421 U.S. 658 (1975), the U.S. Supreme Court held that strict criminal liability for violations of a federal food contamination statute is valid when the president of a business voluntarily assumes a position of authority in a business whose "services & products affect the health and well-being of the public that supports them." *Id.* at 672. *See also* Commission on Legal Problems of Elderly, American Bar Association, *Model Recommendations: Intermediate Sanctions for Enforcement of Quality of Care in Nursing Homes* (July 1981); Butler, *A Long Term Health Care Strategy for Legal Services,* 14 Clearinghouse Rev. 613, 688-89 (1980); W. LaFave & A. Scott, *supra* note 5, at 219-22.

9. *See generally* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Colum. L. Rev. 1254, 1279-80 (1966); *See also* W. LaFave & A. Scott, *supra* note 5, at 222 for criticism of strict liability for economic offenses.

10. Gribetz & Grad, *supra* note 9, at 1279. *See also* Winer, *Pro Se Aspects of Hampden County Housing Court: Helping People Help Themselves,* 17 Urb. L. Ann. 71, 81 (1979).

11. W. LaFave & A. Scott, *supra* note 5, at 223.

12. *Id.*

13. Comments from Beatrice A. Close, Deputy Director, Office of the Deputy Attorney General for Medicaid Fraud Control, State of New York (Oct. 14, 1983).

14. *Id.*

15. This is adapted from N.Y. Soc. Serv. Law § 131-0 (9)(b) (McKinney Supp. 1982-1983).

16. Gribetz & Grad, *supra* note 9, at 1280.

17. *Id.*

18. Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801, 823, n.110 (1965). The author notes that housing agency officials indicated that owners' fear of prosecution is a significant deterrent.

19. *See* Penkower, *The Housing Court of Pittsburgh,* 17 Urb. L. Ann. 141 (1979); LoRusso, *The Buffalo Housing Court: A Special Court for Special Needs,* 17 Urb. L. Ann. 199 (1979); Croteau, *Housing Specialists in the Hampden County Housing Court,* 17 Urb. L. Ann. 85 (1979); Spada, *The Hartford-New Britain Judicial District Housing Court,* 7 Urb. L. Ann. 187 (1979); American Bar Association, *Housing Justice in the United States: Recommendations for Change and Innovation in Our Courts* (1979) (unpublished report on file with the American Bar Association, Washington, D.C.); Executive Summary, American Bar Association, *Specialized Courts: Housing Justice in the United States* (1981).

20. One commentator cited a successful prosecution effort for nursing home violations during a one-year period in Los Angeles. *See* Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement*, 57 N.C.L. Rev. 1317, 1368 (1979). City attorneys claimed that the effort resulted in "improved quality of care. . . since they did not receive further complaints about any of the same facilities." Los Angeles attorneys also noted that criminal prosecution was quicker and had a greater deterrent impact than civil actions. *Id.*

21. *See* Harv. L. Rev. at 823; Gribetz & Grad, *supra* note 9, at 1279 n. 111. There is a distinction generally drawn between "the effects on the [person] being punished" called individual prevention, and "the effects of punishment upon members of society in general" called general prevention; the theory receiving the most attention has been "general deterrence" involving the "ability of criminal law to make citizens law-abiding." W. LaFave & A. Scott, *supra* note 5, at 21-25. *See generally* J. Andenaes, *Punishment and Deterrence* (1974), for an excellent discussion and analysis of deterrence. Some commentators share the view that empirical evidence is lacking as to whether in fact punishment has a "general deterrent" effect, or an effect on the general public. *Id.* The effectiveness of such deterrence, if it exists, seems to depend upon a number of variables, including the severity of the punishment; the probability of rapid discovery, conviction, and punishment; the nature of the crime; different reactions of individuals based upon intellectual, social, or emotional differences; whether an "expert criminal" is involved; and others. In considering these factors, licensees of board and care homes are unlikely to be deterred where nondangerous violations are involved.

    Deterrence is also doubtful when prosecutions occur, if fines are low, and the licensee can pay the fine but still not remedy the violations. It also is unlikely that prosecutions will be initiated for nondangerous violations, further weakening the deterrent effect. An informal survey of agencies with jurisdiction over board and care homes revealed that criminal prosecution for violation of licensing standards was extremely rare. Telephone Survey of State Board and Care Agencies, Commission on Legal Problems of the Elderly, American Bar Association and Aging Health Policy Center, University of California at San Francisco (Apr.-Sept., 1982).

22. *See* J. Andenaes, *The Moral or Educative Influence of Criminal Law,* in *Punishment and Deterrence* 113-14 (1974).

23. *See supra* note 21.

SECTION 39. REMEDIES CUMULATIVE.

The remedies provided in this Act are cumulative and shall not restrict any agency or person from seeking any remedy provided by law or from obtaining additional relief based upon the same facts.

COMMENT

The model act provides a broad range of enforcement mechanisms, both public and private. Its goal is to promote their use if they can be used effectively to remedy violations or redress noncompliance in a board and care home. This section provides that the agency is not precluded from imposing multiple sanctions against a board and care home if such imposition is necessary to effectively remedy violations in the home. It also ensures

that a resident harmed by a board and care home is not precluded from taking private action against the home by the agency's having taken enforcement action against it.[1]

1. This section is adapted from Ill. Stat. Ann. ch. 111½, § 4153-714 (Smith-Hurd Supp. 1982-1983).

SECTION 40. ZONING FOR BOARD AND CARE HOMES.

Section 40.1. Small Board and Care Homes: Status as a Permitted Use.

A small board and care home is a residential use of property for zoning purposes. Political subdivisions shall treat small board and care homes as a permitted use in all residential zoning districts including all single-family residential zoning districts. No political subdivision may require that a small board and care home, or its licensee or administrator, obtain a conditional use permit.

COMMENT

Under the model act, appropriate and distinct zoning treatment is provided to each category of homes established in section 4. Small board and care homes, because of their smaller physical size and limited number of residents, are compatible with the lowest density residential zoning districts. The model act affords zoning treatment consistent with the size and population of small board and care homes by making them a permitted use in all residential zones, including single-family residential zoning districts. This means that small board and care homes can locate as a matter of right in any residential zoning district. The licensee of such a home is entitled to develop the home without being required to seek permission from the local zoning authority. The model act's requirements relating to the physical structure of board and care homes ensure that small homes located in residential areas will be safe and appropriate structures.

*Robert J. Hopperton, Professor of Law, University of Toledo Law School, is the author of this section on zoning for board and care homes.

Section 40.2. Medium Board and Care Homes: Status as a Permitted Use and Conditionally Permitted Use.

A medium board and care home is a residential use of property for zoning purposes. Political subdivisions shall treat medium board and care homes as a permitted use in all residential zoning districts except single-family residential zoning districts. No political subdivision may require that a medium board and care home, or its licensee or administrator, obtain a conditional use permit except when such a board and care home is to be located in a single-family residential zoning district.

COMMENT

Medium board and care homes are also residential uses and should be treated as such. However, their size (nine [9] to sixteen [16] persons) suggests that they are appropriately treated as permitted uses in all residential zoning districts except those districts with the lowest of densities. Thus, the model act establishes medium board and care homes as permitted uses in low-density multi-family zones (e.g., twelve [12] or fewer units per acre) and in high-density zones (e.g., more than twelve [12] units per acre). The act also authorizes political subdivisions to treat board and care homes of this size as conditionally permitted uses in single-family residential zones. Because the physical size and number of residents may be problematic in the very lowest density residential zones, some degree of local discretion, exercised through the conditionally permitted use device, is appropriate.

Section 40.3. Large Board and Care Homes: Status as a Permitted Use and Conditionally Permitted Use.

A large board and care home is a residential use of property for zoning purposes. Political subdivisions shall treat large board and care homes as a permitted use in all high-density, multi-family residential zoning districts. No political subdivision may require a large board and care home, or its licensee or administrator, obtain a conditional use permit, except when such a board and care home is to be located in a single-family residential zoning district or a low-density, multi-family residential zoning district.

COMMENT

As board and care homes become larger, more local discretion is appropriate. Large board and care homes housing seventeen (17) to [thirty (30)] persons are given permitted use status only in high-density residential zoning districts (e.g., more than twelve [12] units per acre). In these districts, a licensee may develop such a home as a matter of right. In lower density multi-family zoning districts and in single-family residential zoning districts, the conditionally permitted use status is appropriate so as to provide necessary local control over the establishment of large board and care homes

Permitted use status in high-density residential zoning districts is given to only those homes housing up to [thirty (30)] persons. This provision is consistent with the act's suggested maximum size limitation of [thirty (30)] persons provided in section 4.

Section 40.4. Density Controls Administered by the Agency.

(A) For purposes of avoiding over-concentration of board and care homes, the agency shall promulgate regulations in the following areas:

(1) limits on the number of board and care homes permitted on blocks, block faces, and other geographic areas within the various types of political subdivisions of the state. These limits shall take into account the existing population density and the number, occupancy, and location of existing community residential facilities serving persons in juvenile, mental health, drug, alcohol, criminal justice, and other treatment, supervision, or rehabilitation programs.

(2) procedures by which any resident of a residential zoning district or the governing body of a political subdivision in which a board and care home is, or is to be, located may petition the agency to deny an application for a license to operate a board and care home on the grounds that the operation of such a home would violate the limits established under paragraph (A)(1) of this section.

(3) any other regulations necessary to carry out the requirements of this section, provided that compliance with these regulations shall not relieve the board and care home of the obligation to comply with the general requirements or standards of a political subdivision pertaining to building, housing, health, fire, safety, and motor vehicle parking that are applied to residential structures of a similar size in the zoning district; and provided further that no requirements for business licenses, gross receipt taxes, environmental impact studies, or clearances may be imposed on such homes if these fees, taxes, or clearances are not imposed on all residential structures of similar size in the zoning district.

(B) An applicant for a license to operate a board and care home shall file a copy of the application as provided in section 17.2 with the governing body of the political subdivision having zoning jurisdiction over the land on which the board and care home is to be located.

COMMENT

An important consideration regarding zoning for board and care homes is avoiding over-concentration of these homes, either in relation to other board and care homes or in relation to other types of residential facilities. The best technique for avoiding over-concentration while serving the basic purpose of the act is to vest responsibility for solving this potential problem with the state licensing agency rather than local officials. Local officials might use such zoning authority to exclude or severely restrict board and care homes. Therefore, the agency is given responsibility under this section to promulgate appropriate regulations concerning limits of over-concentration. Establishing guidelines for determining when the density of board and care homes in the community is reaching a critical or excessive level is an essential but difficult task.[1]

The statewide registry mandated by section 13 will provide the agency and interested parties, such as local residents and the governing bodies of political subdivisions, with information regarding the location and size of board and care homes. Procedures mandated by paragraph (A)(2) will give local residents and political subdivisions an opportunity to be heard on locational questions regarding a given board and care home. Subsection (B) ensures that zoning authorities are aware of applications for board and care home licenses by requiring the potential licensee to file a copy of the license application with such agency.

Taken together these provisions ensure state regulation of locational limits, while giving political subdivisions and their residents relevant locational information and an opportunity to be heard. The only objections that political subdivisions and their residents may raise are those which demonstrate a violation of the agency's regulations regarding the number of other similar facilities and their occupancy, or the population of the area.

Paragraph (A)(3) permits political subdivisions to impose the same requirements regarding building, housing, health, fire, safety, and off-street parking on board and care homes as are applied to typical residences in the same area. Similarly, the second provision of paragraph (A)(3) prohibits local fees, taxes, and environmental impact clearance procedures on board and care homes from exceeding those imposed on residential structures of similar capacity in the same area. Political subdivisions could not, for example, demand payment of business taxes. They could, however, where not otherwise forbidden, demand payment of local property taxes at the same rate applied to single-family dwellings in the neighborhood.

1. *See* D. Lauber & F. Bangs, *Zoning for Family and Group Care Facilities* (Am. Soc. of Planning Officials, Planning Advisory Service Rep. No. 300, March, 1974) which suggests reasonable limits on the minimum floor area, minimum lot area, and number of facilities per block, block face, and neighborhood. *See also* R. Hopperton, *Zoning for Community Homes: A Handbook for Local Legislative Change* (Ohio State University Law Reform Project, 1975).

Section 40.5. Exclusion by Private Agreement Void.

Any restriction, reservation, condition, exception, or convenant in any subdivision plan, deed, or other instrument pertaining to the transfer, sale, lease, or use of property that would conflict with sections 40.1, 40.2, or 40.3 shall be void, to the extent of such prohibition, as against the public policy of this state and shall be given no legal or equitable force or effect.

COMMENT

This section is designed to void private agreements whenever they are used to exclude board and care homes. Because this section is designed to void existing as well as

future private agreements that exclude board and care homes, some may raise questions of due process, retroactivity, or impairment of obligation of contract. Such objections are not well-founded. One state, Wisconsin, has already passed legislation similar to this section dealing with community homes.[1] Other states, such as New York and Texas, have enacted similar statutory provisions voiding private agreements that prohibit the sale, lease, or use of real property on the basis of race, religion, or national origin.[2] While there is no case law as yet interpreting these statutes, case law in other states indicates that provisions voiding already existing contracts for the sale of stock[3] and for the rental of property[4] have been found valid.[5]

1. Wis. Stat. Ann. § 46.03(22)(d)(1979).
2. *See* N.Y. Gen. Oblig. Law § (McKinney 1978) and Tex. Rev. Civ. Stat. Ann. art. 1293a (Vernon Supp. 1978).
3. *Massillon Savings & Loan Co. v. Imperial Finance Co.,* 151 N.E. 645 (1926).
4. *Industrial Development & Land Co. v. Goldschmidt,* 206 P. 134 (1922).
5. *See also Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934).

SECTION 41. SEPARABILITY OF SECTIONS

If any section, subsection, paragraph, sentence, or any other part of this Act is adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined to the section, subsection, paragraph, sentence, or any other part of this Act directly involved in the controversy in which the judgment has been rendered.

COMMENT

The separability clause included in the model act expresses a legislative intent that if any part of the act is found invalid by a court, the remainder should be upheld. The clause, however, is not a command to the court.[1] Rather, it reverses the presumption that the legislature intends an act to be effective only in its entirety.[2]

If a provision of a statute that includes a separability clause is found invalid, the court will undertake an independent analysis of whether the balance of the statute can stand without the invalid provision.[3] It will apply to the statute before it the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.[4]

1. *Dorchy v. Kansas,* 244 U.S. 286, 290 (1924); *Bell v. Maryland,* 387 U.S. 226, 239-41 (1964); 2 Sutherland, *Statutory Construction* § 44.08 (1973).
2. *Carter v. Carter Coal Co.,* 298 U.S. 238, 312 (1936).
3. The authority of a court to eliminate an invalid provision of an act and sustain the valid elements is inherent in its judicial powers. Sutherland, *supra* note 1, at § 4.08.
4. 298 U.S. at 313.

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APPENDIX A

Commenters to Model Act

Margaret R. Eby, President, Personal Care Providers' Association, Gordonville, PA; Charles Edwards, General Counsel and Director of Government Affairs, American Association of Homes for the Aging, Washington, DC; American Health Care Association, Washington, DC; Joni Fritz, Executive Director, National Association of Private Residential Facilities for the Mentally Retarded, Falls Church, VA; Jack A. MacDonald, Executive Vice President, National Council of Health Centers, Washington, DC; Beth Inabinett, Executive Director, Boarding Home Advocacy Team, Philadelphia, PA; Carolyn Leilich, Boarding Home Ombudsman, Philadelphia, PA; Barbara W. Frank, National Citizens' Coalition for Nursing Home Reform, Washington, DC; Patricia M. Brooks, Division of Policy Development and Interpretation, Department of Pensions and Security, Montgomery, AL; Charles A. Hatfield, Jr., Program Director, Office of Institutional and General Sanitation, Department of Health and Social Services, Dover, DE; Robert P. Jaye, Deputy Assistant General Counsel for Program Review, U.S. Department of Health and Human Services, Office of the General Counsel, Washington, DC; Carolyne K. Davis, Administrator, U.S. Department of Health and Human Services, Washington, DC; Benjamin Latt, U.S. Department of Health and Human Services, Washington, DC; Charles Edwards, General Counsel and Director of Government Affairs, American Association of Homes for the Aging, Washington, DC; Donald Fisher, Project Officer, Board and Care Project, U.S. Department of Health and Human Services, Washington, DC; Eleanor A. Beamer, Unit Administrator, Aging and Adult Services, Department of Health and Rehabilitative Services, Tallahassee, FL; Richard H. Overman, Chief, Bureau of Licensure, Planning and Quality Assurance, Department of Mental Health, Jefferson City, MO; Dana L. Petrowsky, Chief, Division of Health Facilities, State Department of Health, Des Moines, IA; Catherine M. Cobb, Manager, Boarding Home Program, Department of Human Services, Augusta, ME; Cal Badding, Deputy Director, Institutional Services, Department of Social Services, Jefferson City, MO; Cary B. Lund, Attorney, Department of Social and Rehabilitation Services, Helena, MT; Mary T. Pilkington-Casey, Chief, Bureau of Adult Services, Department of Health and Welfare, Concord, NH; Patricia Fair-Riedesel, Director, Standards and Quality Assurance, Concord, NH; Charles Ferguson, Chief, Bureau of Health Facilities Administration, Department of Health and Welfare, Concord, NH; Michelle Gage, Coordinator, Bureau of Standards and Inspections, Department of Human Services, Trenton, NJ; Lu Dethlefs, Program Coordinator, Program Operations Section, Department of Human Resources, Salem, OR; Terry Roth, Association for Retarded Citizens, Pittsburgh, PA; Kathleen Burns Gerrity, Supervisor, Personal Care Boarding Homes, Department of Public Welfare, Philadelphia, PA; Robert D. DiCenso, President-elect, Association of Health Facility, Department of Health, Providence, RI; Benjamin R. Martin, Director of Social Work, Department of Mental Retardation, Ladson, SC; Deborah C. Hiser, Attorney, Advocacy Incorporated, Austin, TX; Carolyn H. Stevens, Director, Division of Licensing Programs, Department of Social Services, Richmond, VA.

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